DOCKET

No. 07-1356
Title: Kansas, Petitioner
v.
Donnie Ray Ventris
Docketed: April 29, 2008
Lower Ct: Supreme Court of Kansas
Case Nos.: (94,002)
Decision Date: February 1, 2008
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 28 2008	Petition for a writ of certiorari filed. (Response due May 29, 2008)
May 28 2008	Order extending time to file response to petition to and including June 30, 2008.
May 29 2008	Brief amici curiae of New Mexico, et al. filed.
Jun 30 2008	Brief of respondent Donnie Ray Ventris in opposition filed.
Jun 30 2008	Motion for leave to proceed in forma pauperis filed by respondent Donnie Ray Ventris.
Jul 11 2008	Reply of petitioner Kansas filed.
Jul 16 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Oct 1 2008	Petition GRANTED.
Oct 9 2008	Motion to appoint counsel filed by respondent Donnie Ray Ventris.
Oct 21 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for the petitioner.
Oct 29 2008	Motion DISTRIBUTED for Conference of November 14, 2008.
Nov 5 2008	Joint appendix filed. Statement of costs received.
Nov 7 2008	SET FOR ARGUMENT ON Wednesday, January 21, 2009.
Nov 17 2008	Motion to appoint counsel filed by respondent GRANTED. Matthew J. Edge, Esquire, of Topeka, Kansas, is appointed to serve as counsel for the respondent in this case.
Nov 17 2008	Brief of petitioner Kansas filed.
Nov 24 2008	Brief amicus curiae of United States filed.
Nov 24 2008	Brief amicus curiae of Criminal Justice Legal Foundation filed.
Nov 24 2008	Brief amici curiae of New Mexico, et al. filed.
Nov 28 2008	CIRCULATED.
Dec 11 2008	Record received from the Supreme Court of Kansas. (1 box)
Dec 12 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Dec 16 2008	The time within which to file respondent's brief on the merits is extended to and including December 19, 2008.
Dec 19 2008	Brief of respondent Donnie Ray Ventris filed. (Distributed)
Dec 23 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Jan 9 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jan 13 2009	Reply of petitioner Kansas filed. (Distributed)

Jan 21 2009 Argued. For petitioner: Stephen R. McAllister, Solicitor General, Topeka, Kan.; and Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Matthew J. Edge, Assistant Appellate Defender, Topeka, Kan. (Appointed by this Court.)

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PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 07-

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes—a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Kansas Supreme Court (Pet. App. 1a-48a) is reported at 176 P.3d 920 (Kan. 2008). The Kansas Court of Appeals' opinion (Pet. App. 49a-64a) is unpublished. *State v. Ventris*, No. 94,002, 2006 WL 2661161 (Kan. Ct. App. Sept. 15, 2006).

JURISDICTION

The Kansas Supreme Court issued its opinion on February 1, 2008. This petition has been filed within 90 days of that date, as required by Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST., amend. VI.

The Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST., amend. XIV.

STATEMENT

In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that a statement made to police in

violation of *Michigan v. Jackson*, 475 U.S. 625, 636 (1986), may be used to impeach a defendant's testimony, just as statements taken in violation of the *Miranda* rule may be used for impeachment. *See Edwards v. Arizona*, 451 U.S. 477 (1981). In other words, a defendant's testimony may be used for impeachment purposes when he has knowingly and voluntarily waived his right to counsel, but his waiver is deemed invalid because police initiated interrogation following the defendant's assertion of his right to counsel. The Court in *Harvey* left open the question of "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." 494 U.S. at 454. This case squarely presents that issue, which has deeply divided the Circuits and state courts of last resort.

The issue left open in *Harvey* appears to arise in two contexts: (1) the police initiate interrogation after a defendant has invoked the right to counsel and the defendant makes statements without ever purporting to make a knowing and voluntary waiver of his rights (a *Jackson*-like violation); and (2) the police use a co-defendant, informant or other agent to surreptitiously elicit statements from a defendant after his right to counsel has attached. *See Massiah v. United States*, 377 U.S. 201, 206 (1964) (defendant "was denied the basic protections of [the Sixth Amendment right to counsel] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been

indicted and in the absence of his counsel"); *United States v. Henry*, 447 U.S. 264 (1980) (defendant's rights were violated when the government placed an informant in his cell for the purpose of eliciting incriminating statements from defendant after his right to counsel had attached); *but see Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (merely placing an informant in a defendant's cell to listen for, but not to elicit, such statements does not violate a defendant's rights because "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation").

In either scenario, the defendant does not purport to make a knowing and voluntary waiver of his right to counsel (in the *Massiah* situation he does not even realize he is being interrogated). The lower court decisions discussed below address and split on both situations, and Kansas attempts in its citations to make clear into which category each case falls, even though it appears likely that the same end result should obtain for both situations. That said, this case on its facts involves the *Massiah* situation, and squarely raises the important question the Court left unresolved in *Harvey*.

1. Respondent, Donnie Ray Ventris, was convicted of aggravated robbery and aggravated burglary by a jury in Montgomery County, Kansas. Pet. App. 9a. He was acquitted of felony murder and misdemeanor theft. *Id.* Respondent was sentenced to 247 months

for aggravated robbery and 34 months for aggravated burglary. *Id.* *

Respondent's convictions stem from the robbery and murder of Ernest Hicks. In the early morning hours of January 7, 2004, Respondent and his then girlfriend, Rhonda Theel, discussed confronting Hicks about his alleged abuse of the children with whom Hicks was living. Pet. App. 4a. Theel had also learned from friends that Hicks carried large amounts of cash on his person. *Id.* Respondent and Theel, with the help of friends, eventually made their way to Hicks' residence and confronted him. While inside, either Respondent or Theel shot and killed Hicks with a .38 revolver, then stole Hicks' cell phone and his wallet which contained approximately $300 in cash. *Id.* at 5a-6a.

During the prosecution of this case, Theel entered an agreement with the State to testify against Respondent and she was permitted to plead guilty to aggravated robbery and aiding a felon. Pet. App. 6a. During Respondent's trial, Theel testified that Respondent shot and killed Hicks after the two men argued. *Id.* at 6a-7a. Respondent also testified, but he claimed that it was Theel who shot and killed Hicks. *Id.* at 7a-8a.

In rebuttal to Respondent's testimony, the State offered the testimony of Johnnie Doser, a former cellmate of Respondent's during the time Respondent was awaiting trial. Pet. App. 8a. The State recruited Doser to share a cell with Respondent and

* Though not stated in the opinion, Respondent's sentences are consecutive for a controlling term of 281 months.

listen for any statements Respondent might make about the murder of Hicks. *Id.* According to Doser, Respondent implicated himself, claiming that the Hicks robbery "went sour" and that Respondent shot Hicks before robbing him of money, keys and a vehicle. *Id.* In exchange for Doser's testimony, the State released Doser from his probation. *Id.* at 8a-9a. Over Respondent's objection, the trial court allowed Doser to testify, concluding that although placing Doser in a cell with Respondent violated Respondent's Sixth Amendment right to counsel (a proposition that the State's trial counsel conceded), Doser's testimony was admissible for impeachment purposes in light of Respondent's testimony that Respondent did not shoot Hicks. *Id.* at 9a. The jury convicted Respondent of aggravated burglary and aggravated robbery (but acquitted him of felony murder).

2. On appeal, the Kansas Court of Appeals rejected Respondent's argument that admitting Doser's testimony for impeachment purposes violated Respondent's Sixth Amendment right to counsel. Pet. App. 59a. The intermediate court recognized, as all lower state and federal courts to address the question have, that the Court's decision in *Harvey* expressly left open the issue facing the Kansas court. *Id.* at 57a. The court of appeals then examined decisions from the lower federal courts and other state courts, and found that a majority of jurisdictions to have addressed the issue have held that such statements are admissible for impeachment purposes, so long as they were voluntarily made. *Id.*

at 57a-59a. The court of appeals followed the majority approach and upheld Respondent's convictions.

3.a. Over a dissenting opinion, the Kansas Supreme Court reversed Respondent's convictions. The court concluded that Doser's testimony could not be admitted, even for impeachment purposes and even in the absence of *any* evidence that Respondent's statements were involuntary. Instead, the court held that the only consideration which matters is that the evidence was obtained in violation of the *Massiah* rule: "[o]nce a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial *for any reason, including the impeachment of the defendant's testimony*." Pet. App. 20a (emphasis added). The majority further concluded that the admission of Doser's testimony for impeachment purposes was not harmless error. *Id.* at 23a.

The court below acknowledged that "[n]either this court nor the United States Supreme Court has previously addressed the issue presented by the facts of this case." Pet. App. 17a. After reviewing *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), and *Harvey*, the Kansas Supreme Court concluded that such cases were not controlling here because in those cases the alleged or established violation involved law enforcement officials speaking directly with the defendant. In contrast, the statements at issue here "were made to

a jailhouse informant who was surreptitiously acting as an agent of the State." Pet. App. 15a.

The Kansas court concluded that *Massiah* and *Henry* were more relevant to the analysis. Pet. App. 19a-20a. Nonetheless, the Kansas Supreme Court opined that neither *Massiah* nor *Henry* answered the question presented here. *Id.* at 16a-17a.

Instead, the Kansas Supreme Court looked to lower federal court and state court cases addressing the question "specifically left open" by this Court in *Harvey*. Pet. App. 17a. In its discussion, the Kansas Supreme Court acknowledged that the lower federal and state courts have divided on the impeachment issue. The court pointed out that the Tenth Circuit and the Air Force Court of Criminal Appeals have held that such statements are admissible for impeachment purposes. *See id.* at 17a-18a (citing *United States v. McManaman*, 606 F.2d 919 (10th Cir. 1979), and *United States v. Langer*, 41 M.J. 780 (A.F. Ct. Crim. App. 1995)). The Kansas court recognized that, in contrast, the Supreme Court of Maine has held that such statements are not admissible for any purpose. Pet. App. 19a (citing *State v. York*, 705 A.2d 692 (Me. 1997)).

After reviewing the split of authority, the Kansas Supreme Court opined as follows:

> From these cases, we have discerned two analytical approaches for resolving the issue. The first approach focuses on the court's truth-seeking function by denying the defendant an opportunity to commit perjury without contradiction. This approach ignores *Henry* and the requirement that

> defendants make a knowing and voluntary waiver of their Sixth Amendment right to counsel. The second approach requires a knowing and voluntary waiver of the Sixth Amendment right to counsel. The knowing and voluntary waiver is not dependent upon whether the defendant will have an opportunity to commit perjury.

Pet. App. 19a.

The Kansas court then declared that the second approach was more consonant with this Court's decisions in *Harvey* and *Henry*. As a result, the court ruled that testimony such as Doser's is inadmissible for any purpose. Pet. App. 19a-20a.

3.b. The Chief Justice dissented. Pet. App. 27a-48a. In her view, the majority incorrectly analyzed the question, and the court's rule of exclusion for all purposes went beyond what the decisions of this Court require. *Id.* at 28a. She would have held that testimony such as Doser's is admissible for the limited purpose of impeaching a defendant's testimony, so long as the statements were voluntarily made, declaring that:

> Although the United States Supreme Court has not addressed this precise issue, it has repeatedly and consistently allowed the admission of evidence and statements otherwise inadmissible in the prosecution's case in chief to be used for purposes of impeachment, except where such evidence was obtained by coercion or was otherwise involuntary.

Id. at 27a.

REASONS FOR GRANTING THE WRIT

The question presented in this petition is the subject of a deep and enduring split in the Circuits and the state courts of last resort. Indeed, the split appears to predate the Court's decisions in *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Michigan v. Harvey*, 494 U.S. 344 (1990). *See Lucas v. New York*, 474 U.S. 911 (1985) (White, J., dissenting from the denial of *certiorari*) (asserting that the Circuits and state courts had split on the question whether the prohibition in *New Jersey v. Portash*, 440 U.S. 450 (1979), against using statements obtained in violation of the Fifth Amendment for impeachment purposes "applies equally to statements taken in violation of the Sixth Amendment right to counsel"). In fact, the split of authority has only deepened and widened over time.

The Kansas Supreme Court acknowledged the split of authority but failed to appreciate both the depth and scope of that split. As demonstrated below, many Circuits and several state courts of last resort have weighed in on the question the Court expressly left open in *Harvey*, 494 U.S. at 354: "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel." The majority of courts permit the use of voluntary statements obtained without a knowing and voluntary waiver of the Sixth Amendment right to counsel to be used for impeachment purposes. But others, including now at least three courts of last resort and one Circuit, hold

to the contrary. Only a decision by this Court will resolve this split of authority. It is clear that the lower courts will not on their own reach a uniform resolution of the important constitutional question presented, especially not with the most recent decision on the issue (the Kansas Supreme Court in this case) adopting the minority position, which deepens rather than weakens the split of authority.

Legal scholars have recognized that the Court's decisions leave uncertainty regarding the precise nature of and bases for the Sixth Amendment right to counsel, with corresponding uncertainty about the very question presented in this case. *See, e.g.*, Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2527 (1996) (noting that the Court has left open the question "whether a 'core' *Massiah* violation—that is, a statement obtained from a defendant whose Sixth Amendment right to counsel has never been waived—is itself a violation of the Sixth Amendment" or instead whether *Massiah* "is not an interpretation of the Constitution, but rather a prophylactic rule designed to sweep more broadly than the actual constitutional right in order to deter police misconduct"); James J. Tomkovicz, *Saving* Massiah *from* Elstad*: The Admissibility of Successive Confessions Following a Deprivation of Counsel*, 15 WM. & MARY BILL RTS. J. 711, 749 (2007) (observing that "if exclusion is a constitutional right, even limited use for impeachment is impermissible. On the other hand, if exclusion is not a right but a deterrent safeguard or part of a prophylactic scheme

designed to prevent constitutional violations, impeachment use may be permissible. A five Justice majority, however, managed to find a way to resolve the narrow issue in *Harvey* without identifying the general rationales for Sixth Amendment exclusion.").

In addition to the deep split of authority, the Kansas Supreme Court's decision is simply wrong. Although this Court has not resolved the precise issue presented, relevant Fourth, Fifth, and Sixth Amendment precedents strongly support the conclusion that a defendant's voluntary statements may be used for impeachment, first and foremost to protect the integrity of the judicial system by deterring perjury. Certainly, that is already the rule in Fourth and Fifth Amendment cases, and the Court in *Harvey* made a step in that direction under the Sixth Amendment as well. This Court's plenary review is warranted here to resolve the precise question left unanswered in *Harvey*.

A. The Kansas Supreme Court's Decision Conflicts With Decisions From Many Circuits And Several State Courts Of Last Resort

In ruling that a defendant's voluntary statements made in violation of the right to counsel are never admissible for any reason, including impeachment, the Kansas Supreme Court acknowledged a split of authority on the question presented. Pet. App. 17a-20a. However, that court cited only a few decisions either supporting or conflicting with its holding. There are in fact many more cases on point—the split in the Circuits and courts of last resort is both much

wider and much deeper than the lower court's opinion suggests.

As the Kansas Court of Appeals correctly acknowledged, in this case, a majority of state and federal courts have found that voluntary statements obtained in violation of the Sixth Amendment right to counsel remain admissible for impeachment purposes. Pet. App. 58a. The Kansas Supreme Court, however, adopted the minority view—that such statements are never admissible for any purpose—a position taken by at least two other courts of last resort and one Circuit. *See State v. York*, 705 A.2d 692, 695 (Me. 1997) (*Massiah* violation: holding that the essence of a *Massiah* violation is the *use at trial* of the evidence obtained and, therefore, such evidence cannot be used for any purpose, including impeachment); *Simpson v. United States*, 632 A.2d 374, 382 (D.C. 1993) (police officer engaged defendant, knowing that defendant's Sixth Amendment right to counsel had attached and that any statements obtained would not be admissible in the government's case in chief; the court held that "exclusion for all purposes of the statements taken in this knowing and intentional violation of Sixth Amendment rights is mandated. To permit the balancing of competing interests here would allow the exception to swallow the rule"); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992) (government-initiated interrogation: the court held that "in the absence of a later waiver of the initially invoked right to counsel, any subsequent statement transgresses the core constitutional right to counsel,

rather than a judicially created prophylactic rule for the protection of that right, and therefore should not be available to the prosecution for any purpose."); *United States v. Abdi*, 142 F.3d 566 (2d Cir. 1998) (government initiated interrogation: the court followed *Spencer*).

On the other side of the split of authority, several Circuits and state courts of last resort have held that voluntary statements obtained in violation of *Massiah* or in a *Jackson*-like situation (without a purported waiver) are admissible for impeachment.

The Circuit Decisions: *United States v. Bender*, 221 F.3d 265, 271 (1st Cir. 2000) (*Massiah* situation: "Nothing prevents the government from using [defendant's] statements, if knowing and voluntary, for the purpose of impeachment, if he testifies"); *United States v. Stevens*, 935 F.3d 1380, 1395-96 (3d Cir. 1991) (dicta: describing distinction between impeachment and substantive guilt evidence as it relates to inconsistent statements made during pretrial services interview, and recognizing that evidence obtained in violation of Fourth, Fifth, and Sixth Amendment rules generally may be used for impeachment purposes); *United States v. Yancey*, No. 97-4893, 1998 WL 393972, at *2 (4th Cir. July 10, 1998) (*Massiah* situation: statements obtained may be used to impeach a defendant's trial testimony); *United States v. Laury*, 49 F.3d 145, 150 (5th Cir. 1995) ("It is well established that the prosecution may use a statement obtained in violation of the Sixth Amendment to impeach a defendant's false or inconsistent testimony."); *Bradford v. Whitley*, 953

F.2d 1008, 1011 (5th Cir. 1992) ("When a defendant chooses to take the stand, he assumes an obligation to speak truthfully. That the government may have resorted to unconstitutional means to obtain a confession does not mean the defendant is justified in turning the illegality to his advantage, thereby preventing the prosecution from exposing his prior inconsistent statements at trial."); *United States v. Fellers*, 397 F.3d 1090, 1097 (8th Cir. 2005), *abrogated on other grounds by United States v. Thorpe*, 447 F.3d 565, 569 n.3 (8th Cir. 2006) ("uncounseled statements obtained in violation of the Sixth Amendment may be used at trial for impeachment purposes"); *United States v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000) (government initiated questioning: the court held that the defendant assumed a reciprocal obligation to speak truthfully and thus government may use statements to impeach defendant's inconsistent testimony); *United States v. Danielson*, 325 F.3d 1054, 1067 (9th Cir. 2003) (*Massiah* violation: court states in dicta that such statements are admissible for impeachment purposes, so long as they are voluntary); *United States v. McManaman*, 606 F.2d 919, 925 (10th Cir. 1979) (evidence that is inadmissible in the Government's case in chief can be used in rebuttal to impeach the defendant); *United States v. Denetclaw*, 96 F.3d 454, 457 (10th Cir. 1996) (statements made in a prior plea hearing without the assistance of counsel are admissible for impeachment purposes in a later proceeding); *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1235-36 (11th Cir. 2003) (dicta: so long as a statement obtained in violation of the Sixth

Amendment right to counsel is deemed voluntary it may be used for impeachment purposes).

See also Trevino v. Alameida, No. C 04-0720 MMC (PR), 2007 WL 781590, at *15 (N.D. Cal. Mar. 13, 2007) ("the federal circuits that have addressed the issue are split, with the Ninth Circuit and other circuits allowing voluntary statements obtained in violation of *Massiah* to be used for impeachment"); *United States v. Red Bird*, 146 F. Supp. 2d 993, 1009 (C.D.S.D. 2001) (statement taken in violation of the Sixth Amendment that was not the product of coercion or otherwise involuntary is admissible at trial for impeachment purposes); *United States v. Martin*, 974 F. Supp. 677, 684 (C.D. Ill. 1997) (*Massiah* violation: statements obtained cannot be used in government's case in chief, but may be used for impeachment if the government establishes how the defendant's testimony on direct examination opens the door for impeachment *via* the statements at issue); *United States v. Campbell*, 805 F. Supp. 1379, 1385 (W.D. Tex. 1992) (a statement taken in violation of the Sixth Amendment that would be inadmissible during the prosecution's case in chief is admissible for impeachment purposes); *United States v. Langer*, 41 M.J. 780, 784 (A.F. Ct. Crim. App. 1995) (statement suppressed for Sixth Amendment violation remains admissible for impeachment).

The State Courts of Last Resort Decisions: *State v. Conway*, 842 N.E.2d 996, 1020 (Ohio), *cert. denied*, 127 S. Ct. 122 (2006) (*Massiah* situation: the Court held that defendant's recorded statements, "although obtained in violation of his right to counsel, were

admissible solely to impeach his untruthful trial testimony"); *State v. Mattatall*, 603 A.2d 1098, 1114 (R.I. 1992) (*Massiah* situation: the court held that "constitutional violations that are beyond the prophylactic rules do not necessarily warrant the exclusion of such evidence for all purposes. The exclusion of reliable and probative evidence for *all* purposes is not mandated unless it is derived from coerced or involuntary statements.") (emphasis in original). *Cf. People v. Branch*, 805 P.2d 1075, 1081 (Colo. 1991) (en banc) (statements made to state doctor in competency hearing: so long as statements are deemed voluntary they may be used for impeachment purposes, even if they were obtained in violation of procedural safeguards).

See also People v. Frazier, 715 N.W.2d 341, 347 (Mich. App. 2006), *rev'd in part on other grounds*, 733 N.W.2d 713 (Mich. 2007) (government-initiated interrogation: suppression for *all* purposes only necessary when statement is deemed truly involuntary); *State v. Cherry*, 83 P.3d 123, 125 (Idaho Ct. App. 2003) (government-initiated interrogation: statements obtained in the absence of a knowing and voluntary waiver of right to counsel admissible for impeachment purposes); *State v. Southworth*, 52 P.3d 987, 994 (N.M. Ct. App. 2002) (government-initiated interrogation: statements admissible for impeachment purposes); *Garza v. State*, 18 S.W.3d 813, 827 (Tex. App. 2000) ("the Sixth Amendment does not bar the use of a defendant's voluntary statement for impeachment where the defendant testifies at trial, even if the impeaching statements

were elicited in violation of that defendant's Sixth Amendment right to counsel").

The preceding citations alone demonstrate that the question presented in this petition arises frequently, will continue to arise, and has generated a deep and enduring split of authority that only this Court can resolve. The Kansas Supreme Court's decision to adopt the minority view highlights that the split is not likely to resolve itself, illustrates the continuing uncertainty regarding this important Sixth Amendment issue, and ultimately demonstrates the need for this Court to resolve now the important question the Court expressly left open in *Harvey*. *See* 494 U.S. at 354. Indeed, an objective observer cannot fairly say that the lower courts have achieved—or are even moving toward—a consensus on the question presented. Finally, this case cleanly presents the issue the Court left open in *Harvey* and is an appropriate vehicle to resolve that question.

B. The Kansas Supreme Court's Decision Is Contrary To This Court's Precedents

The Court's cases hold that once the Sixth Amendment right to counsel attaches statements elicited from a defendant outside the presence of counsel and not accompanied by a valid waiver are inadmissible in the government's case in chief. *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984); *United States v. Henry*, 447 U.S. 264, 273-74 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964). In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court adopted a prophylactic rule that, once a defendant invokes his Sixth Amendment right to

counsel, any future waiver of that right as a result of a law enforcement-initiated interrogation is presumed invalid, even if the waiver otherwise would be considered knowing and voluntary. *Id.* at 629-32.

In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that a *Jackson* violation does not preclude the prosecution from using a defendant's statements for impeachment purposes. *Id.* at 350-51. The question here is possibly different for two reasons: (1) this case does not involve a *Jackson* violation but, rather, a *Massiah/Henry* violation; and (2) in this case there is no purported waiver of Respondent's Sixth Amendment rights, which presumably will always be true of *Massiah/Henry* cases. That said, the weight of the Court's precedents, including the reasoning of *Harvey* and analogies to the Fourth and Fifth Amendment contexts, strongly suggests that statements such as those at issue here should be admissible for impeachment purposes.

As a general constitutional rule, criminal defendants' voluntary statements should be admissible for impeachment purposes. The Court in Sixth Amendment cases and criminal procedure decisions more generally has weighed the costs of excluding relevant probative evidence against the very real danger of effectively countenancing perjured testimony by excluding such evidence. *See, e.g., Harris v. New York*, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury."); *Oregon v. Hass*, 420 U.S. 714, 722

(1975) ("[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, from the risk of confrontation with prior inconsistent utterances."); *United States v. Havens*, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."); *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.")(emphasis in original); *see also United States v. Lott*, 854 F.2d 244, 249 (7th Cir. 1988) ("the antiperjury considerations that generated the *Harris* line of cases are applicable" in the Sixth Amendment context and require that statements obtained in violation of that right be "admissible for impeachment purposes").

Further, the Court has made clear that it has "mandated the exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements." *Harvey*, 494 U.S. at 351 (emphasis in original). Thus, the Court has "never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are 'not themselves rights protected by the Constitution.'" *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

Thus, the Court has recognized that the exclusion of relevant, probative evidence for *all* purposes is appropriate only when a core constitutional right is

violated with the consequence that the evidence itself is highly suspect, typically because it was obtained by intolerable methods such as coercion or compulsion, means that might render a defendant's statements involuntary. *See, e.g., Harvey*, 494 U.S. at 351 (citing *Portash*, 440 U.S. at 459, and *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)); *United States v. Patane*, 542 U.S. 630, 639 (2004). The record in this case lacks *any* indication of coercion or compulsion of Respondent. Pet. App. 35a.

For more than fifty years, the Court has recognized the fundamental importance of discouraging perjury in order to protect the integrity of the judicial system and seek the truth, while at the same time protecting defendants' constitutional rights. The Court typically has reconciled those twin objectives as follows: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Walder v. United States*, 347 U.S. 62, 65 (1954).

In Fourth and Fifth Amendment cases, as well as in *Michigan v. Harvey*, the Court has consistently drawn a constitutional line between evidence used in the government's case in chief and evidence used for impeachment purposes. That line is appropriate as a general rule for Sixth Amendment cases, and the Court should take this opportunity to adopt such a rule and clarify its Sixth Amendment jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 28, 2008

APPENDIX

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 94,002

STATE OF KANSAS,

Appellee,

v.

DONNIE RAY VENTRIS,

Appellant.

[Feb. 1, 2008]

SYLLABUS BY THE COURT

1. Once a criminal prosecution has commenced, a defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony.

2. Without a knowing and voluntary waiver of the right to counsel, the admission of a defendant's uncounseled statements to an undercover informant who is acting as a State agent violates the defendant's Sixth Amendment rights.

3. The test for Sixth Amendment violations is whether the defendant knowingly and voluntarily waived the right to counsel.

4. Waiver is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege.

5. The erroneous admission of evidence in violation of a constitutional right is governed by the federal constitutional error rule, which provides that an error is harmless only if the reviewing court is able to declare beyond a reasonable doubt that the error had little, if any, likelihood of changing the outcome of the trial.

6. When analyzing a district court's decision to admit evidence, an appellate court first considers whether the evidence is relevant. Once relevance is established, the court applies the evidentiary rules either as a matter of law or in the exercise of the district court's discretion, depending on the contours of the rule in question.

7. An appellate court reviews the admission of evidence pursuant to K.S.A. 60-455 as a question of law, subject to de novo review.

8. When a party on appeal asserts an error without providing any argument or authority in support of that assertion, an appellate court will not address the appellant's assertion of error.

9. Pursuant to K.S.A. 60-455, evidence of other crimes and civil wrongs is not admissible if it is not relevant to a disputed material fact. Relevance is established by some material and logical connection between the asserted fact and inference or result it is intended to establish.

10. Res gestae has been rejected as a legal basis for admitting evidence.

11. Before admitting evidence of other crimes and civil wrongs, the district court must determine whether the evidence is relevant to any disputed material fact. If so, the court must then determine whether the evidence is more probative than prejudicial. If the district court concludes that the evidence survives these hurdles, it must give the jury a limiting instruction.

Review of the judgment of the Court of Appeals in an unpublished opinion filed September 15, 2006. Appeal from Montgomery district court; RAWLEY (JUDD) DENT II, judge. Judgment of the Court of Appeals affirming the district court is reversed. Judgment of the district court is reversed. Opinion filed February 1, 2008.

Matthew J. Edge, of Kansas Appellate Defender Office, argued the cause and was on the brief for appellant.

Linda E. DeWitt, special counsel, of Phalen, Bicknell & Markle Law Offices, of Coffeyville, argued the cause, and *F. William Cullins*, county attorney, and *Phill Kline*, attorney general, were with her on the brief for appellee.

The opinion of the court was delivered by ROSEN, J.:

Donnie Ventris petitioned this court to review the Court of Appeals' decision affirming his convictions for aggravated robbery and aggravated burglary. Ventris asserts that the district court improperly

admitted impeachment testimony from a jailhouse informant who had been surreptitiously planted in his jail cell by the State; that the district court improperly admitted evidence in violation of K.S.A. 60-455; and that his sentence should be reversed because the determination of his criminal history was not proven to a jury beyond a reasonable doubt.

The following facts are taken from the Court of Appeals' decision:

> "Sometime in the last part of 2003, Ventris met and began living with Rhonda Theel in a romantic relationship. At some point, Theel learned from another friend, Kim Eytcheson, about the victim in this case, Ernest Hicks. She heard that Hicks was abusing the children of his live-in girlfriend, Helen Cargile. She also heard that Hicks was wealthy and carried $500 to $600 on his person. Eytcheson was also a friend of Cargile.
>
> "On January 6, 2004, and into the early morning hours of January 7, 2004, Theel and Ventris were using methamphetamine and marijuana at their home. Neither had slept for a couple of days. At approximately 6 a.m., Theel suggested to Ventris that they go to Hicks' residence so she could talk to Hicks about the alleged child abuse. Theel called Eytcheson to find out when Cargile's children left for school. Theel also called another friend, Martha Denton, and asked Denton to meet her and Ventris at 'Pump Station Road.' Theel wanted Denton to give her and Ventris a ride to Hicks' residence, because she thought it would be best not to drive Ventris' car all the way to Hicks' house.

"Denton did not know why Theel wanted to meet her at Pump Station Road. Nevertheless, she proceeded to the meeting place with her boyfriend, Keith Holt. By this time, Ventris and Theel had arrived at the meeting place in Ventris' truck and began watching Hicks' residence, waiting for Cargile to leave with her children. When Denton and Holt arrived, Theel asked Holt to take her and Ventris to Hicks' residence and told Denton to take Ventris' truck with her. Denton and Holt complied.

"Theel gave Holt directions to Hicks' residence. She also told him that she and Ventris were going there so a guy could show them a dog. As they arrived at Hicks' residence, Theel noted that Hicks' truck was in the driveway and told Holt to drive past the house, turn around, head back towards the residence, and turn into the driveway next to Hicks' truck. Ventris 'never said a word.'

"After Holt pulled into the driveway, Theel exited the vehicle and told Ventris to wait while she went to the door and knocked. Theel had also told Holt he could leave, because the guy living at the house was supposed to give her and Ventris a ride back. According to Holt's trial testimony, Ventris waited behind a black pickup while Theel knocked on the door. As Holt pulled out of the driveway, he saw Ventris pull a ski mask down over his face, but Holt could not tell whether the ski mask left Ventris' face open or covered everything but his eyes. The outside temperature was 5 to 10 degrees that morning.

"While Theel and Ventris were inside Hicks' residence, one or both of them shot and killed Hicks with a .38 revolver, took his wallet containing approximately $300, and a cell phone. Theel drove herself and Ventris in Hicks' truck to a secluded spot in Oklahoma where she sprayed the truck with cleaner to get rid of any fingerprints. The two of them then walked to a convenience store. On the way, Theel tried unsuccessfully to disassemble the murder weapon. One of them disposed of the gun in a culvert.

"At the convenience store, Theel called Denton and asked her for a ride home. Denton and Holt eventually picked Theel and Ventris up at the store and took them back to their home in Kansas. Sometime later, Denton and Holt contacted the police after developing a suspicion that Theel and Ventris had something to do with Hicks' murder. Police arrested both Theel and Ventris and charged them each with several crimes.

"Theel entered into a plea bargain in exchange for her testimony against Ventris. Specifically, she pled guilty to aggravated robbery and aiding a felon. The State tried Ventris before a jury on charges of felony murder, aggravated robbery, aggravated burglary, felony theft, and misdemeanor theft. Theel, Ventris, and a former cellmate of Ventris' all testified at trial. Both Ventris and Theel denied taking a gun to Hicks' residence, and they both claimed the reason for going to the residence was for Theel to talk to Hicks about the alleged child abuse. However, each

related a different version of the events that occurred after arriving at Hicks' residence.

"Highly summarized, Theel testified as follows. As she was waiting for Hicks to come to the door, she saw a frightened look on Hicks' face and then Ventris quickly passed her and entered the house. She then entered and almost immediately saw Hicks on the floor and Ventris standing over him. She heard them arguing. She then saw that Ventris had a .38 revolver and heard him ask Hicks about money. She attempted to stop the two from arguing by dousing them with a cleaner she retrieved from the kitchen and by also hitting Hicks with a stick. Hicks produced a wallet and Ventris said, 'All this for 40 or 50 dollars?' The two men walked to the bedroom after Hicks said he had more money there. Theel then heard two shots and saw Ventris come out of the bedroom. She claimed Ventris said, 'I have to shoot him again,' to which she responded, 'Okay.' According to her testimony, she then left the house and at some point heard a third shot. Ventris then came out of the house and threw Hicks' truck keys to her. She used the keys to gain access to Hicks' truck and drove herself and Ventris away from the scene.

"Ventris, as one might anticipate, offered a different version as follows. He testified that he only went with Theel on the day in question to 'shut her up' since she had been talking for days about Hicks committing child abuse. He denied hearing about Hicks and his money. He also denied taking a gun with him and did not know if Theel

had one. He denied knowing that Theel had called Denton to arrange a ride, but he admitted going to the meeting place where they met Denton and Holt. There he and Theel entered Holt's car and traveled to Hicks' house. Once there, Hicks became agitated with Theel over her accusations of child abuse. A scuffle ensued between himself and Hicks, and Theel threw a liquid in Hicks' face and hit him with a stick. Theel then pulled out a gun and asked Hicks for his wallet. Ventris asked her what she was doing, and she replied that he should mind his own business. Hicks said his wallet was in the bedroom, and she told him to go get it. Theel and Hicks went into the bedroom, and Theel shot him. Ventris started to leave and then heard two more shots. He denied taking anything with him when he left. He got into the truck with Theel only after she said she would take him to his truck. Nevertheless, they continued on to a gas station where he purchased gas with money Theel gave him.

"As stated earlier, the State also offered at trial the testimony of Johnnie Doser, Ventris' former cellmate, as a rebuttal witness. Prior to trial, the State recruited Doser to share a cell with Ventris and to 'keep [his] ear open and listen' for incriminating statements. According to Doser, Ventris told him that he and his girlfriend 'went to rob somebody and that it went sour.' Ventris allegedly said he shot a guy in the head and chest and took his keys, his wallet, about $350, and a vehicle. In exchange for Doser's testimony, the

State released him from probation. Ventris objected to the testimony, claiming the State had obtained the statements in violation of his Sixth Amendment right to counsel. The State conceded the Sixth Amendment violation but argued the testimony could be used for impeachment purposes. The trial court allowed Doser to testify.

"Prior to closing arguments, the trial court instructed the jury to 'consider with caution' the testimony of both Doser and Theel. The jury deliberated for approximately 2 hours and acquitted Ventris of felony murder and misdemeanor theft. However, the jury found him guilty of aggravated burglary and aggravated robbery. The court had previously dismissed the felony theft charge due to a lack of evidence. Later, the court sentenced Ventris to 247 months for aggravated robbery and 34 months for aggravated burglary." Slip op. at 3-8, *State v. Ventris,* No. 94,002, unpublished opinion filed September 15, 2006.

The Court of Appeals affirmed Ventris' convictions and sentences. *Ventris,* slip op. at 17. Ventris petitioned this court to review the Court of Appeals' decision, and we granted his petition.

For his first issue, Ventris claims that the district court erroneously admitted testimony from his former cellmate, who had been surreptitiously placed in Ventris' jail cell to obtain incriminating statements. Ventris claims that his former cellmate's testimony violated his Sixth Amendment right to counsel.

When an appellate court reviews the district court's decision regarding the suppression of evidence, it gives deference to the trial court's factual findings but applies a de novo standard to the ultimate legal determination of whether the evidence should have been suppressed. *State v. Coleman,* 275 Kan. 796, 805, 69 P.3d 1097 (2003).

The State concedes that it violated Ventris' Sixth Amendment right to counsel when it surreptitiously planted Doser in Ventris' jail cell as a human listening device. Nevertheless, the State argues that the evidence is only precluded from its case-in-chief. The State asserts that it can use the illegally obtained statements in rebuttal to impeach Ventris' testimony.

To support its argument, the State relies on *Harris v. New York,* 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 (1971). In *Harris,* the defendant was charged with selling heroin to an undercover police officer. After Harris was arrested, he made several incriminating statements to the officers without the benefit of proper *Miranda* warnings. Harris testified in his defense, stating that he had sold baking powder to the officers as part of a scheme to defraud drug purchasers. On cross-examination, the State attempted to impeach Harris' testimony by inquiring about several contradictory statements Harris had made after his arrest. The State conceded that the statements were inadmissible in its case-in-chief because they were obtained without *Miranda* warnings but asserted that the statements were admissible for impeachment. 401 U.S. at 223-24.

In a five-to-four decision, the United States Supreme Court agreed with the State. *Harris,* 401 U.S. at 224-25. The *Harris* Court relied on *Walder v. United States,* 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354 (1954), which allowed the admission of illegally obtained physical evidence to impeach the defendant even though the evidence was not admissible in the government's case-in-chief. *Harris,* 401 U.S. at 224-26. Stating that "[t]he shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from risk of confrontation with prior inconsistent utterances," the *Harris* Court concluded that the Court's truth-seeking function outweighed the protection against self-incrimination afforded by Miranda, 401 U.S. at 226.

In *Oregon v. Hass,* 420 U.S. 714, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975), the United States Supreme Court extended the holding in *Harris* to include statements made in violation of a defendant's Fifth Amendment right to counsel. Hass was arrested for stealing bicycles. The police advised Hass of his *Miranda* warnings at the time of his arrest. Hass requested to speak with his attorney and was advised that he could call an attorney when they arrived at the police office. On the way to there, Hass pointed out the houses where the bicycles had been stolen and the location of a stolen bicycle. At trial, Hass testified that he did not know his friends were going to steal bicycles or from where the bicycles had been stolen. To impeach this testimony, the State admitted the statements Hass had made after his arrest. 420 U.S. at 715-17. The *Hass* Court affirmed the use of

the defendant's statements to impeach his testimony, finding no evidence or suggestion that the statements were involuntary or coerced. 420 U.S. at 722.

This court has applied the United States Supreme Court's analysis in *Harris* and *Hass*.In *State v. Osbey,* 213 Kan. 564, 573-74, 517 P.2d 141 (1973), the defendant claimed that the trial court erroneously admitted portions of his confession because there had been no hearing outside the presence of the jury to determine the voluntariness of the confession. Relying on *Harris,* the State claimed that the confession was properly admitted as rebuttal evidence to impeach the defendant. The *Osbey* court agreed with the State, concluding that the statements were properly admitted as rebuttal evidence even though they were not admissible in the State's case-in-chief. 213 Kan. at 574. *See also State v. Andrews,* 218 Kan. 156, 159, 542 P.2d 325 (1975) (same issue).

The facts in *State v. Boone,* 220 Kan. 758, 768-69, 556 P.2d 864 (1976), are similar to those in *Hass.* Boone requested to speak with an attorney after he was arrested and the officers had given him *Miranda* warnings. However, before Boone had an opportunity to talk to an attorney, the officers obtained a statement from Boone regarding his whereabouts prior to his arrest. At trial, Boone testified differently about his whereabouts before his arrest, and the State offered the officer's testimony to impeach him. The *Boone* Court relied on *Harris* and *Hass* in concluding that the evidence was properly admitted to impeach Boone, even though it was inadmissible in

the State's case-in-chief. *Boone,* 220 Kan. at 768-69. *See also State v. Graham,* 244 Kan. 194, 203-04, 768 P.2d 259 (1989) (allowing statements made without *Miranda* warnings to be used to impeach the defendant's testimony); *State v. Greene,* 214 Kan. 78, 82, 519 P.2d 651 (1974) (admitting statements made with improper *Miranda* warnings to be used for impeachment); *State v. Robinson,* 4 Kan. App. 2d 428, 433, 608 P.2d 1014 (1980) (assuming that the defendant did not properly and effectively waive his *Miranda* rights but allowing the State to use the statements to impeach the defendant); *State v. Stoops,* 4 Kan. App. 2d 130, 134-35, 603 P.2d 221 (1979) (affirming the admission of statements made to police after the defendant invoked his right to counsel to impeach the defendant). *Cf. State v. Roberts,* 223 Kan. 49, 57-58, 574 P.2d 164 (1977) (distinguishing *Harris* and *Hass* and precluding the admission of involuntary statements to impeach the defendant).

In keeping with its decisions in *Harris* and *Hass,* the United States Supreme Court extended the Fifth Amendment analysis to a Sixth Amendment issue in *Michigan v. Harvey,* 494 U.S. 344, 350-51, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990). Two months after Harvey had been arraigned on two counts of rape, he told a police officer that he would like to make another statement but did not know if he should talk to his attorney. The officer told Harvey that he did not need to speak with his attorney because his attorney would get a copy of the statement anyway. After signing portions of a constitutional rights

waiver indicating that he understood his right to remain silent and have an attorney present during the questioning, Harvey made statements that were inconsistent with his later trial testimony. The State conceded that Harvey's statements were not admissible during its case-in-chief, but argued that under *Harris,* the statements were admissible to impeach Harvey. 494 U.S. at 346-47.

In another five-to-four decision, the *Harvey* Court agreed with the State but remanded the matter for factfinding to determine whether Harvey had knowingly and voluntarily waived his Sixth Amendment right to counsel. 494 U.S. at 354. The *Harvey* Court noted the prophylactic rule from *Michigan v. Jackson,* 475 U.S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986), which requires the exclusion of any statements made to police after the Sixth Amendment right to counsel has attached if the police initiated the conversation. Reasoning that the *Jackson* prophylactic rule was analogous to the *Miranda* prophylactic rule, the *Harvey* Court extended its holding in *Harris* to apply to Sixth Amendment violations. 494 U.S. at 349, 351. The *Harvey* Court stated that the "'search for the truth in a criminal case' outweighs the 'speculative possibility' that exclusion of evidence might deter future violations of rules not compelled directly by the Constitution in the first place,"494 U.S. at 351-52.

The dissenting justices in *Harvey* refused to reduce the Sixth Amendment right to counsel to the status of a prophylactic rule, stating:

> "The exclusion of statements made by a represented and indicted defendant outside the presence of counsel follows not as a remedy for a violation that has preceded trial but as a necessary incident of the constitutional right itself. '[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.' *Strickland v. Washington,* 466 U.S. 668, 684, [80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)]. It is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. [Citations omitted.] It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim." 494 U.S. at 362-63.

In this case, the State's reliance on *Harris* and its progeny does not reconcile the factual distinction between those cases and this case. In *Harris, Hass,* and *Harvey,* the defendant dealt directly with law enforcement officers. In contrast, the statements at issue in this case were made to a jailhouse informant who was surreptitiously acting as an agent of the State. We believe this factual distinction is significant.

The United States Supreme Court addressed the impact of jailhouse informants on the Sixth Amendment right to counsel in *United States v. Henry,* 447 U.S. 264, 65 L. Ed. 2d 115, 100 S. Ct. 2183 (1980). In *Henry,* government agents sought assistance from an jailhouse informant who had provided confidential information to the government

for over a year. The government agents asked the jailhouse informant to be "alert to any statements" made by Henry and other federal prisoners. 447 U.S. at 266. Henry confided in the jailhouse informant about his involvement in a bank robbery and sought the informant's assistance in breaking out of jail. The jailhouse informant testified against Henry at his trial.

The *Henry* Court held that the admission of the jailhouse informant's testimony violated Henry's Sixth Amendment right to counsel. 447 U.S. at 274. The *Henry* Court relied on *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246 , 84 S. Ct. 1199 (1964), which held that the government cannot use a defendant's incriminating statements when the statements are obtained by a surreptitious informant working as an agent for the government. Noting that the "concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government," the *Henry* Court concluded that Henry's statements "should not have been admitted *at trial.*" (Emphasis added.) 447 U.S. at 273-74. The *Henry* Court distinguished between Fourth and Fifth Amendment cases, stating that "those cases are not relevant to the inquiry under the Sixth Amendment here—whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements." 447 U.S. at 272. Unlike the Court's analysis in *Harris, Hass*, and *Harvey,* the *Henry* Court did not consider whether

the government violated a prophylactic rule or a constitutional right.

Neither this court nor the United States Supreme Court has previously addressed the issue presented by the facts of this case. Although the *Harvey* Court addressed a related issue, it specifically left open the question presented by the facts in this case, stating, "we need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." 494 U.S. at 354. However, a few other jurisdictions have squarely addressed the issue.

In *United States v. McManaman,* 606 F.2d 919 (10th Cir. 1979), the Tenth Circuit allowed the admission of statements the defendant made to an undercover informant for the purpose of impeaching the defendant's testimony. Deciding the issue without the benefit of the *Henry* decision, the *McManaman* court refused to extend the *Massiah* rule, which precludes the admission of evidence obtained by an undercover informant while the defendant is represented by counsel. Instead, the *McManaman* court relied on the reasoning in *Walder,* stating that a defendant is not free to make a sweeping denial of the charges by "possibly perjurious testimony, in reliance on the Government's inability to challenge his credibility because its rebuttal evidence was illegally secured." 606 F.2d at 925.

Likewise, in *United States v. Langer,* 41 M.J. 780 (A.F. Ct. Crim. App. 1995), the United States Air Force Court of Criminal Appeals allowed the

admission of the defendant's statements to an undercover informant to impeach the defendant's testimony. Relying on *Harvey,* the *Langer* court stated:

> "We see no significant distinction between a Sixth Amendment violation committed in a station house, by police officers who have identified themselves to a suspect, and a covert one committed by an undercover agent. In each instance, society demands that the prosecution pay a price so that future violations may be deterred. That price is exclusion of the tainted evidence from the prosecution case-in-chief. However, society should not be made to suffer a Sixth Amendment violation as a license for an accused to commit perjury without fear of contradiction. Such a cost is too high." 41 M.J. at 784.

In *United States v. Martin,* 974 F. Supp. 677 (C.D. Ill. 1997), a federal district court in Illinois ruled that the Government could use the defendant's statements to an undercover agent to impeach the defendant's testimony. The *Martin* court concluded that the defendant's statements to the undercover agent were voluntary but that he had not made a knowing and voluntary waiver of his right to counsel. Nevertheless, the *Martin* court reasoned that barring the defendant's statements "would diminish the Court's truth-seeking purpose in a criminal trial and would give too little weight to antiperjury considerations." 974 F. Supp. at 684.

In contrast, the Supreme Court of Maine held that the State could not use surreptitiously recorded

statements obtained in violation of the defendant's right to counsel to impeach the defendant's testimony. *State of Maine v. York,* 705 A.2d 692 (Me. 1997). Concluding that offering the evidence amounted to a constitutional violation rather than the violation of a prophylactic rule because the defendant did not waive his right to counsel, the *York* court distinguished *Harvey* and refused to admit the evidence for any purpose. 705 A.2d at 695.

From these cases, we have discerned two analytical approaches for resolving the issue. The first approach focuses on the court's truth-seeking function by denying the defendant an opportunity to commit perjury without contradiction. This approach ignores *Henry* and the requirement that defendants make a knowing and voluntary waiver of their Sixth Amendment right to counsel. The second approach requires a knowing and voluntary waiver of the Sixth Amendment right to counsel. The knowing and voluntary waiver is not dependent upon whether the defendant will have an opportunity to commit perjury.

The Court of Appeals followed the first approach, focusing on the court's truth-seeking function and preventing perjury. While this approach is supported by *McManaman, Langer,* and *Martin,* it fails to harmonize the United States Supreme Court's decisions in *Henry* and *Harvey.* The *Harvey* Court refused to address the admission of statements made without a knowing and voluntary waiver of the Sixth Amendment right to counsel. The *Henry* Court concluded that a defendant cannot knowingly and

voluntarily waive his Sixth Amendment rights if he or she is dealing with an undercover informant. Considering *Harvey* in conjunction with *Henry* leads us to conclude that the second approach applied by the *York* court is more constitutionally sound.

A criminal prosecution commences when a complaint is filed and a warrant issued. The defendant's Sixth Amendment right to counsel attaches at that point. *State v. McCorgary* 218 Kan. 358, 361, 543 P.2d 952 (1975), *cert. denied,* 429 U.S. 867 (1976). Once a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony. *Cf. State v. Pennington*, 276 Kan. 841, 846, 80 P.3d 44 (2003) (allowing statements from an undercover jailhouse informant acting as an agent for the State because the defendant had not been charged with the crime at issue). Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights. By following the first approach, the Court of Appeals primarily focused on admissibility of rebuttal evidence rather than the impact of such a glaring violation of a constitutional right.

Without a knowing and voluntary waiver of the right to counsel, the admission of the defendant's

uncounseled statements to an undercover informant who is secretly acting as a State agent violates the defendant's Sixth Amendment rights. We disagree with the conclusion that the admission of such statements merely violates a prophylactic rule. Unlike *Harris,* the State did not simply fail to give Ventris *Miranda* warnings, and, unlike *Harvey,* the State did not merely interrogate Ventris after his right to counsel had attached. Rather, the State purposely circumvented the requirement for a knowing and voluntary waiver of Ventris' right to counsel when it recruited Doser to surreptitiously obtain statements from Ventris in his jail cell. Allowing the admission of this testimony as rebuttal evidence would invite the State to engage in clandestine behavior in gathering evidence in violation of our constitutional rights. The purity of justice under our Sixth Amendment's constitutional right to counsel cannot be polluted by the subversive conduct of deceitful acquisition of evidence.

The State seeks to limit our analysis to whether Ventris' statements to Doser were voluntary. However, the State's argument misstates the applicable test for Sixth Amendment violations. Voluntariness of the statement is a test for Fifth Amendment violations. *See Hass,* 420 U.S. at 722. The test for Sixth Amendment violations is whether the defendant knowingly and voluntarily waived the right to counsel. *See Harvey,* 494 U.S. at 354. Waiver is valid only when it reflects "'an intentional relinquishment or abandonment of a known right or privilege.'" *Patterson v. Illinois,* 487 U.S. 285, 292,

101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019, [1938]). In this case, there are no facts to support a finding that Ventris knowingly and voluntarily waived his right to counsel even though his statements to Doser may have been voluntary.

In reaching our conclusion that the district court erroneously admitted testimony from a jailhouse informant in this case, we find it necessary to emphasize the fact that the jailhouse informant in this case was recruited to be an agent for the State. The fact that the State initiated the contact with the jailhouse informant and arranged to secretly monitor the defendant's statements distinguishes this case from a case where the jailhouse informant approaches the State with information and offers to testify against the defendant. We find the State's conduct to be particularly egregious in this case, particularly because the State knew that its actions violated Ventris' Sixth Amendment rights. Nevertheless, we do not intend for the rule in this case to deter testimony from all informants. Rather, the rule is meant to prohibit the State from recruiting undercover informants to obtain statements once a prosecution has commenced without a knowing and voluntary waiver of the defendant's Sixth Amendment right to counsel. This rule does not apply when informants approach the State with relevant information that is otherwise admissible.

Ventris properly argues that the district court erroneously admitted testimony from a jailhouse

informant who had been surreptitiously placed in Ventris' jail cell to obtain incriminating evidence. The admission of the evidence violated Ventris' Sixth Amendment right to counsel. However, an error of constitutional magnitude does not require reversal if it is harmless. The erroneous admission of evidence in violation of a constitutional right is governed by the federal constitutional error rule, which provides that an error is harmless only if the reviewing court is able to declare beyond a reasonable doubt that the error had little, if any, likelihood of changing the outcome of the trial. *State v. Hebert,* 277 Kan. 61, 96, 82 P.3d 470 (2004).

The jailhouse informant's testimony directly contradicted Ventris' version of events. The jury had to decide whether to believe Theel's story that Ventris masterminded the robbery or Ventris' story that Theel orchestrated the events in which he was not a willing participant. The jailhouse informant's testimony was admitted solely to impeach Ventris' credibility. Although the verdict indicates that the jury did not fully believe Theel, we cannot conclude beyond a reasonable doubt that the admission of the jailhouse informant's testimony would not have changed the result of the trial. Without the jailhouse informant's testimony, the jury might have considered Ventris' story more believable and acquitted him on all of the counts. Accordingly, we must find that the error was not harmless and Ventris' convictions must be reversed.

Although the first issue is dispositive of Ventris' convictions, we must address the second issue

because it may arise again at Ventris' next trial. Ventris argues that the district court erroneously admitted Theel's testimony that Ventris had forcibly strip-searched Theel approximately 1 month before Hicks was killed. Ventris argues that the evidence was admitted in violation of K.S.A. 60-455 without a motion or a limiting instruction. According to Ventris, the evidence was highly prejudicial because it implied that Ventris was a dominating partner. The State argues that the evidence was properly admitted as res gestae to explain the relationship between Theel and Ventris.

The Court of Appeals concluded that the district court abused its discretion by admitting the evidence but determined that the error was harmless. *Ventris,* slip op. at 16. When analyzing a district court's decision to admit evidence, an appellate court first considers whether the evidence is relevant. Once relevance is established, the court applies the evidentiary rules either as a matter of law or in the exercise of the district court's discretion, depending on the contours of the rule in question. *State v. Gunby,* 282 Kan. 39, 47, 144 P.3d 647 (2006). Once relevance has been established, an appellate court reviews the admission of evidence pursuant to K.S.A. 60-455 as a question of law, subject to de novo review. 282 Kan. at 47-48.

Ventris first claims that the evidence could not be admitted because the State failed to file a motion seeking the admission of the evidence. Ventris cites no authority for this claim. Without any supporting argument or authority, we decline to address this

argument. *See State v. Baker,* 281 Kan. 997, 1015, 135 P.3d 1098 (2006).

Next, Ventris asserts that the evidence violated K.S.A. 60-455, which provides:

> "Subject to K.S.A. 60-447 evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove his or her disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion but, subject to K.S.A. 60-445 and 60-448 such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

Pursuant to K.S.A. 60-455, evidence of other crimes and civil wrongs is not admissible if it is not relevant to a disputed material fact. Relevance is established by some material and logical connection between the asserted fact and inference or result it is intended to establish. *Gunby,* 282 Kan. at 47.

The district court admitted the evidence independently of K.S.A. 60-455, relying on the concept of res gestae. However, we put an end to the practice of admitting evidence of other crimes or civil wrongs independently of K.S.A. 60-455 in *Gunby,* 282 Kan. at 57. We also rejected res gestae as a legal basis for admitting evidence, stating:

> "This case provides an opportunity to end this particular confusion of thought, and we hereby do so. The concept of res gestae is dead as an

independent basis for admissibility of evidence in Kansas. That evidence may be part of the res gestae of a crime demonstrates relevance. But that relevance must still be measured against any applicable exclusionary rules. *Gunby,* 282 Kan. at 63.

The Court of Appeals concluded that the trial court committed error. However, the Court of Appeals concluded that the error was harmless. We decline to make that determination at this point. We have already concluded that Ventris is entitled to a new trial on other grounds. If the State seeks admission of this evidence at Ventris' new trial, the district court must address the test for admitting evidence of other crimes or civil wrongs. Specifically, the district court must determine whether the evidence is relevant to any disputed material fact. If so, the court must then determine whether the evidence is more probative than prejudicial. If the district court concludes that the evidence survives these hurdles, it must give the jury a limiting instruction. *See Gunby,* 282 Kan. at 56-57.

Because we have reversed Ventris' convictions and vacated his sentences, we do not need to address his claim that his sentences are unconstitutional because they are dependent on the determination of his criminal history which was not proven beyond a reasonable doubt to a jury.

DAVIS and JOHNSON, JJ., not participating.

McANANY, J., and LARSON, S.J., assigned.[1]

McFARLAND, C.J., dissenting: I respectfully dissent from the majority's decision holding that, once a criminal prosecution has commenced, statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including impeachment of the defendant's testimony.

Although the United States Supreme Court has not addressed this precise issue, it has repeatedly and consistently allowed the admission of evidence and statements otherwise inadmissible in the prosecution's case in chief to be used for purposes of impeachment, except where such evidence was obtained by coercion or was otherwise involuntary. The Court determined in those cases that, when the issue is the use of such evidence for impeachment purposes, the deterrence policy supporting exclusion is outweighed by the importance of impeachment to the proper functioning of the truth-finding process.

Moreover, of the jurisdictions that have considered this very issue, all but one have applied the Supreme Court's balancing analysis to hold that uncounseled incriminating statements deliberately elicited from an accused through a secret informant in violation of

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[1] **REPORTER'S NOTE**: Judge Patrick D. McAnany, of the Kansas Court of Appeals, was appointed to hear case No. 94,002 vice Justice Davis pursuant to the authority vested in the Supreme Court by K.S.A. 20-3002(c). Senior Judge Edward Larson was appointed to hear this case vice Justice Johnson pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616.

the Sixth Amendment right to counsel may, nevertheless, be used to impeach a defendant's contradictory trial testimony.

The majority rejects the analysis employed in those cases, choosing instead to adopt a per se rule of exclusion that expands exclusion jurisprudence beyond the limits of that ever recognized by the Supreme Court. I believe the majority's rationale supporting its conclusion is faulty in several respects. First, the majority errs in justifying a per se rule of inadmissibility by finding constitutional significance in the surreptitious nature of the police conduct in this case. It is the deliberate elicitation of uncounseled statements, whether directly by law enforcement officers or secretly through the use of undercover informants, not the surreptitious nature of the government's conduct, that is the gravamen of a Sixth Amendment violation under *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964), and *United States v. Henry,* 447 U.S. 264, 65 L. Ed. 2d 115, 100 S. Ct. 2183 (1980). Second, the majority misapprehends the role of waiver in the analysis of the limited question of whether statements obtained in violation of *Massiah/Henry* should be admissible only for impeachment. Third, the majority ignores the significance of the voluntary nature of the defendant's statements in determining the admissibility of those statements for impeachment purposes.

The significance of the surreptitious nature of the police conduct.

The surreptitious nature of the police conduct in this case is the overriding theme upon which the majority justifies the result. Specifically, the majority determines that the balancing analysis employed in the *Harris* (*Harris v. New York,* 401 U.S. 222, 28 L. Ed. 2d 1, 91 S. Ct. 643 [1971]) line of cases does not apply because the defendants in those cases were dealing directly with law enforcement officers, while in this case the defendant was dealing with an undercover informant who obtained his statements surreptitiously. Moreover, the majority characterizes the conduct in this case as "particularly egregious" due to its surreptitious nature. The majority states:

> "Unlike *Harris,* the State did not simply fail to give Ventris *Miranda* warnings, and, unlike *Harvey,* the State did not merely interrogate Ventris after his right to counsel had attached. Rather, the State purposely circumvented the requirements for a knowing and voluntary waiver of Ventris' right to counsel when it recruited Doser to surreptitiously obtain statements from Ventris in his jail cell. Allowing the admission of this testimony as rebuttal evidence would invite the State to engage in clandestine behavior in gathering evidence in violation of our constitutional rights. The purity of justice under our Sixth Amendment's constitutional right to counsel cannot be polluted by the subversive conduct of deceitful acquisition of evidence." Slip op. at 24.

I am concerned that the majority has erred in finding constitutional significance in the fact that police elicited statements through "surreptitious," "clandestine," and "deceitful" means. The United States Supreme Court has specifically rejected the notion that the surreptitious nature of the police conduct in eliciting uncounseled statements has any constitutional significance. *See Brewer v. Williams,* 430 U.S. 387, 400, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) ("That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant.").

Although *Massiah* and *Henry* involved secret informants, the Sixth Amendment violations in those cases did not hinge on the surreptitious nature of the government's conduct. Rather, it was the government's use of secret informants to *deliberately elicit* incriminating statements from the accused-conduct that is "the functional equivalent of interrogation." *United States v. Henry,* 447 U.S. at 277 (Powell, J., concurring). Explaining his understanding of the majority's holding in *Henry,* Justice Powell stated:

> "[T]he Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. [Citation omitted.] Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions

constituted deliberate and 'surreptitious interrogatio[n]' of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

"... I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant [placed] in a jail cell would violate *Massiah*. To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation. [Citations omitted.]

"Because I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information by such conduct, I join the opinion of the Court." 447 U.S. at 276-77 (Powell, J., concurring).

In *Kuhlmann v. Wilson,* 477 U.S. 436, 459, 91 L. Ed. 2d 364, 106 S. Ct. 2616 (1986), the Court had opportunity to address the "passive listener" situation anticipated by Justice Powell. Wilson was arrested for his role in a robbery of a taxi garage in which the night dispatcher was killed. Upon being arrested, Wilson told the police that although he was present when the crimes occurred he was only a witness. After arraignment, Wilson was purposefully placed in a jail cell with an individual who, unbeknownst to Wilson, had made an agreement with the police to listen for statements made by Wilson and report his remarks to police. The informant was instructed not to ask Wilson any questions.

Wilson first told the informant the same exculpatory version of events that he had given police at the time of his arrest. The informant responded that his story "didn't sound too good." 477 U.S. at 439-40. Later, Wilson changed his story and told the informant that he and two other men had planned and carried out the robbery and had murdered the dispatcher.

At the suppression hearing, the trial court held the statements were admissible. The trial court found that the police had instructed the informant to not ask questions about the crime but to only listen for comments Wilson might make in his presence, and that the informant had followed those instructions. The trial court found that Wilson's statements were spontaneous and unsolicited and that the informant "'at no time asked any questions with respect to the crime,' and that he 'only listened to [Wilson] and made notes regarding what [Wilson] had to say.'" 477 U.S. at 440.

The Supreme Court found no Sixth Amendment violation. The Court held that the Sixth Amendment is not violated where an accused makes statements to a jailhouse informant who was placed in close proximity with the accused but who did not take specific action designed to deliberately elicit incriminating statements. 477 U.S. at 459.

In reaching its decision, the *Kuhlmann* Court examined the *Massiah* line of cases, and concluded that the primary concern in those cases was the government's use of techniques that are the equivalent of direct police interrogation:

> "[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since 'the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached,'474 U.S., at 176, citing *United States v. Henry,* supra, at 276 (Powell, J., concurring), a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann,* 477 U.S. at 459.

After *Kuhlmann,* it is clear that the surreptitious nature of the police conduct in a *Massiah/Henry* violation is not the gravamen of the Sixth Amendment violation. The Sixth Amendment is not implicated where the police surreptitiously obtain incriminating statements from an accused by placing a secret informant in an accused's cell for the purpose of obtaining incriminating statements, as long as the informant does not do what the police cannot do directly—deliberately elicit incriminating remarks. Thus, there is no constitutional significance in the fact that the police dealt with Ventris through a secret informant and surreptitiously elicited incriminating statements from him.

The Air Force Court of Criminal Appeals recognized this point in *United States v. Langer,* 41 M.J. 780 (A.F. Ct. Crim. App. 1995). In holding that statements obtained through a *Massiah* violation may be used for impeachment purposes, the court expressly rejected the notion that the fact that the police elicited the statements indirectly through surreptitious means rather than directly and at the station house has any constitutional relevance in determining the admissibility of those statements for impeachment purposes:

> "Once formal criminal proceedings begin, police may not deliberately elicit statements from an accused without an express waiver of the right to counsel. *Brewer v. Williams,* 430 U.S. 387, 51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977); *Massiah v. United States,* 377 U.S. 201, 12 L. Ed. 2d 246, 84 S. Ct. 1199 (1964); Mil. R. Evid. 305(d)(1)(B). This is true whether the questioning is in a custodial setting and done by persons known by the accused to be police (*Williams*), or surreptitiously by an undercover agent (*Maine v. Moulton,* 474 U.S. 159, 88 L. Ed. 2d 481, 106 S. Ct. 477 (1985); *Massiah*)....
>
> "... We see no significant distinction between a Sixth Amendment violation committed in a station house, by police officers who have identified themselves to a suspect, and a covert one committed by an undercover agent." *Langer,* 41 M.J. at 783-84.

"[T]he soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible and the creation of another area of privileged testimony....

[A]dditional barriers to the pursuit of truth [should be erected on] solid foundations which decisions of this gravity ... require." *Massiah,* 377 U.S. at 208 (White, J., dissenting). Because the majority's rationale rests on the unsound characterization of the surreptitious police conduct as an egregious constitutional violation, I dissent.

Before moving on, I must note that the State conceded that it violated the Sixth Amendment. In conceding this point in its brief, the State cites *State v. McCorgary,* 218 Kan. 358, 361-363, 543 P.2d 952 (1975), *cert. denied,* 429 U.S. 867 (1976). In *McCorgary,* this court held that, because the surreptitious arrangement is the evil at issue, deliberate elicitation is not required to establish a *Massiah* violation. 218 Kan. at 362. *McCorgary,* however, predates *Kuhlmann* and, thus, it is no longer a correct statement of the law. The State's brief does not cite *Kuhlmann* but, in light of that case, I believe there is a legitimate issue as to whether the State's conduct in this case violated the Sixth Amendment. Under *Kuhlmann,* merely placing Doser in Ventris' cell for the purpose of listening for incriminating statements did not violate Ventris' constitutional right to counsel. Ventris' Sixth Amendment right to counsel was violated only if the State, through Doser, "took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann,* 477 U.S. at 459. From the record on appeal, it does not appear that Doser crossed that line.

Doser was approached by Steve Fryback (it appears, but is not clear, that Fryback is a law enforcement officer) and was asked if he would be willing to be placed in Ventris' cell to listen for and report what he might say. Doser testified that he was specifically told "[j]ust to keep [his] ear open and listen ... to what he had to say."

The first day Doser was in the cell with Ventris, he was not very talkative. On the second day, Doser told Ventris that he could tell by the look in his eyes that he had something more serious weighing on his mind. Ventris than asked Doser if he could trust him. Doser told Ventris that he could. Ventris asked Doser if what he said would stay in the room between them, and Doser said it would. Ventris then showed Doser a piece of paper which showed he had been arrested as a suspect in a murder. Ventris told Doser he would show him his hand in a little bit. After that, Ventris told Doser that he and his girlfriend Rhonda had gone to rob somebody, but it went sour. He said he shot a man in his head and chest, and that he took his keys, his wallet, $350, and a vehicle.

Doser testified that he did not push Ventris for any information and he did not ask him any details. According to Doser, Ventris volunteered information and he simply let Ventris do the talking.

The informant's conduct in this case is not significantly different from the conduct that was held to not be a violation of the Sixth Amendment in *Kuhlmann*. Applying *Kuhlmann*, it would appear at least arguable that Ventris' statements were not obtained in violation of the Sixth Amendment and,

thus, they were admissible for all purposes. This issue should not have been conceded. Prosecutors should be mindful that they represent a party to the litigation—the people of the state of Kansas—and are bound by the ethical duty to provide zealous advocacy on behalf of their client. That duty encompasses the obligation to litigate viable dispositive issues with "earnestness and vigor." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935) (while a prosecutor is not at liberty to strike foul blows, he may strike hard ones, and "[h]e may prosecute with earnestness and vigor—indeed, he should do so.").

The role of waiver in the analysis of whether statements obtained in violation of *Massiah/Henry* should be admissible only for impeachment.

The majority states that there are two analytical approaches for resolving the issue of whether inculpatory statements obtained as the result of a *Massiah/Henry* violation of the Sixth Amendment right to counsel should be admissible for impeachment. One approach focuses on the importance to the truth seeking function of the adversary process that defendants not be permitted the opportunity to commit perjury without fear of contradiction. That approach, according to the majority, "ignores *Henry* and the requirement that defendants make a knowing and voluntary waiver of their Sixth Amendment right to counsel." Slip op. at 22. The other approach, the majority states, requires a knowing and voluntary waiver and is not dependant on preventing the opportunity for perjury.

The majority concludes the waiver approach is the more constitutionally sound and, based thereon, holds that "[w]ithout a knowing and voluntary waiver of the right to counsel, the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State agent violates the defendant's Sixth Amendment rights."Slip op. at 23-24.

The existence of waiver of the right to counsel is a relevant factor in determining whether statements elicited outside of the presence of counsel were obtained in violation of the Sixth Amendment and are therefore inadmissible in the prosecution's case in chief. *See Johnson v. Zerbst,* 304 U.S. 458, 463-64, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). In a *Massiah/Henry* violation, waiver of the right to counsel or, more accurately, the lack thereof, is relevant to the determination that the use of an undercover informant to deliberately elicit uncounseled incriminating statements violated the Sixth Amendment and, consequently, in holding that such statements are inadmissible in the prosecution's case in chief. Specifically, the use of an undercover informant to elicit uncounseled incriminating statements violates the Sixth Amendment because there cannot be a waiver of the right to counsel under those circumstances:

> "[T]he concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. [Citation omitted.] In that setting, Henry, being

> unaware that Nichols was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel." 447 U.S. at 273.

The absence of waiver of the right to counsel inherent in the undercover informant situation is *the* pertinent factor underlying the conclusion that surreptitiously eliciting uncounseled incriminating statements violates the Sixth Amendment and the statements are, therefore, inadmissible in the case in chief. In this case, however, we are beyond determining whether there was a Sixth Amendment violation in the first instance. With waiver being the basis for the determination that statements obtained in violation of *Massiah/Henry* are inadmissible in the prosecution's case in chief, using the absence of waiver again to determine whether those statements should also be inadmissible for impeachment purposes begs the question, as "the answer in the first context necessarily predetermines the answer in the second context." *State v. Hoeck,* 284 Kan. 441, 461, 163 P.3d 252 (2007) (holding that the "substantial basis" test cannot be used to determine both the validity of the warrant and the applicability of the good faith exception to the exclusionary rule because "the answer in the first context necessarily predetermines the answer in the second context"). Accordingly, waiver, or the lack thereof, is simply not relevant to determining the admissibility of surreptitiously elicited statements for impeachment purposes.

The fact that there was a waiver in *Michigan v. Harvey,* 494 U.S. 344, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990), does not mean waiver is relevant in determining the admissibility of the defendant's statements for impeachment under the circumstances of this case. In *Harvey,* the defendant gave a written waiver of the right to counsel. Of course, as discussed above, there is no waiver in a *Massiah* violation. The Supreme Court recognized this distinction in *Harvey* by noting that it was not addressing "the admissibility for impeachment purposes of a voluntary statement obtained in the *absence of a knowing and voluntary waiver of the right to counsel.*" (Emphasis added.) 494 U.S. at 354.

The relevance of the voluntary nature of the statements in determining whether statements obtained in violation of *Massiah/Henry* should be admissible only for impeachment.

In an analysis fatally linked to the erroneous determination that waiver is relevant to the issue of admissibility for impeachment purposes, the majority holds that the voluntary nature of Ventris' statements are irrelevant to the issue of admissibility for impeachment:

> "The State seeks to limit our analysis to whether Ventris' statements to Doser were voluntary. However, the State's argument misstates the applicable test for Sixth Amendment violations. Voluntariness of the statement is a test for Fifth Amendment violations. *See Hass,* 420 U.S. at 722. The test for Sixth Amendment violations is whether the defendant knowingly and voluntarily

waived the right to counsel. *See Harvey,* 494 U.S. at 354. Waiver is valid only when it reflects "'an intentional relinquishment or abandonment of a known right or privilege.'" *Patterson v. Illinois,* 487 U.S. 285, 292, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 [1938]). In this case, there are no facts to support a finding that Ventris knowingly and voluntarily waived his right to counsel *even though his statements to Doser may have been voluntary.*" (Emphasis added.) Slip op. at 24-25.

First, as discussed above, for the issue at hand, we are *beyond* determining whether a Sixth Amendment violation occurred. The relevance of the absence of waiver of the right to counsel inherent in a *Massiah/Henry* violation has been exhausted and is of no further relevance once the issue becomes admissibility for impeachment purposes.

Second, the majority errs in holding that voluntariness is irrelevant to the issue of whether the statements are admissible for impeachment purposes. In fact, in refusing to address the very issue at hand, the Supreme Court in *Harvey* implicitly recognized that even in a situation where there is no waiver of the right to counsel, voluntariness is still relevant to the issue of admissibility for impeachment when it said, "we need not consider the admissibility for impeachment purposes of a *voluntary statement* obtained in the absence of a knowing and voluntary waiver of the

right to counsel." (Emphasis added.) *Harvey,* 494 U.S. at 354.

Moreover, in *Harris,* the Court explained that adopting a per se rule of exclusion that fails to take into account the voluntariness of the statements at issue would be "an extravagant extension of the Constitution:"

> "If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a 'fruit' of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution." *Harris,* 401 U.S. at 225 n.2.

See also State v. Boone, 220 Kan. 758, 768, 556 P.2d 864 (1976) (noting, under *Harris* and *Hass,* statements inadmissible in case in chief may be used for impeachment where there is no evidence that the statements at issue were coerced or involuntary).

The bottom line is that "the exclusion of reliable and probative evidence for *all* purposes" is required only when it is the product of coercion. *Harvey,* 494 U.S. at 351 (citing *New Jersey v. Portash,* 440 U.S. 450, 59 L. Ed. 2d 501, 99 S. Ct. 1292 [1979] [compelled incriminating statements inadmissible for impeachment purposes]; *Mincey v. Arizona,* 437 U.S. 385, 57 L. Ed. 2d 290, 98 S. Ct. 2408 [1978] [same]);

State v. Mattatall, 603 A.2d 1098, 1114 (R.I. 1992) (in holding that surreptitiously elicited statements obtained in violation of the Sixth Amendment under *Henry* may be used for impeachment, court noted that "[t]he exclusion of reliable and probative evidence for all purposes is not mandated unless it is derived from coerced or involuntary statements"). Thus, voluntariness is the *key inquiry* in determining the admissibility of statements obtained in violation of *Massiah/Henry* for purposes of impeachment. *United States v. Martin,* 974 F. Supp. 677, 679-80 (C.D. Ill. 1997) (voluntariness is the key inquiry in determining whether secretly recorded incriminating statements obtained in violation of *Massiah* may be used for impeachment).

In this case, there is nothing in the record that would indicate that Ventris' statements to the undercover informant were coerced or were otherwise involuntarily made. Moreover, the district court found that Ventris' statements to Doser were voluntarily made, and the majority does not hold otherwise.

The balancing analysis.

Although the Supreme Court has not addressed the question of whether statements inadmissible as a product of a *Massiah/Henry* violation may be used for impeachment, in other situations it has consistently allowed illegally obtained evidence and statements of the accused to be admitted for impeachment purposes. *See Walder v. United States,* 347 U.S. 62, 98 L. Ed. 503, 74 S. Ct. 354 (1954) (allowing physical evidence that is inadmissible in the prosecution's

case in chief because it was obtained in violation of the Fourth Amendment to be used to impeach the defendant's testimony); *Harris v. New York,* 401 U.S. 222 (holding that otherwise inadmissible statements obtained from a suspect through custodial interrogation without giving *Miranda* warnings may be used for impeachment purposes); *Oregon v. Hass,* 420 U.S. 714, 722, 43 L. Ed. 2d 570, 95 S. Ct. 1215 (1975) (allowing statements that are inadmissible in the prosecution's case in chief because they were obtained after a suspect invokes his or her right to counsel pursuant to *Miranda* to be used to impeach the defendant's testimony); *United States v. Havens,* 446 U.S. 620, 627-28, 64 L. Ed. 2d 559, 64 L. Ed. 2d 559, 100 S. Ct. 1912 (1980) (evidence illegally seized without a warrant admissible to impeach defendant's trial testimony); *Michigan v. Harvey,* 494 U.S. 344 (uncounseled statements elicited by police pursuant to an illegally obtained waiver of the right to counsel in violation of the Sixth Amendment may be used to impeach the defendant's testimony if the waiver can be shown to be valid).

The United States Supreme Court's decisions in the above cases rest on a careful balancing of two competing interests: the deterrence policy behind the exclusionary rule and the detrimental effect on the truth seeking process if constitutional violations can serve as a license to testify falsely free from the risk of confrontation with contradictory evidence.

The Court's analysis has emphasized "the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the

truth in response to proper questions." *Havens,* 446 U.S. at 626. "If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal 'obligation to speak truthfully and accurately.'" *Harvey,* 494 U.S. at 351 (quoting *Harris,* 401 U.S. at 225). "It is essential ... to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." *Havens,* 446 U.S. at 626-27. The Court has refused to "allow a defendant to 'turn the illegal method by which evidence in the government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Harvey,* 494 U.S. at 351 (quoting *Harris,* 401 U.S. at 224). A defendant should not be permitted to pervert the constitutional shield against having illegally obtained evidence used against him "'into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances.'" *Havens,* 446 U.S. at 626 (quoting *Harris,* 401 U.S. at 226). "[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility." *Walder,* 347 U.S. at 65.

The Supreme Court has consistently found that the importance of the impeachment process to the proper functioning of the adversary system outweighs the deterrence policy behind exclusion of illegally obtained evidence:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris,* 401 U.S. at 225.

See also Havens, 446 U.S. at 627 ("The incremental furthering of [the policy behind exclusion] by forbidding impeachment of the defendant who testifies [is] deemed insufficient to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial.").

Although the Supreme Court has not addressed the question of whether statements inadmissible as a product of a *Massiah/Henry* violation may be used for impeachment, of the jurisdictions that have addressed this issue, all but one have applied the Supreme Court's balancing analysis and ruled that such statements may be used for impeachment. *See United States v. McManaman,* 606 F.2d 919 (10th Cir. 1979); *United States v. Martin,* 974 F. Supp. 677; *United States v. Langer,* 41 M.J. 780; *State v. Mattatall,* 603 A.2d 1098; *State v. Wilder,* 177 W. Va. 435, 352 S.E.2d 723 (1986); *but see State v. York,* 705 A.2d 692 (Me.1997).

Illustrative of the rationale employed in those cases is the Rhode Island Supreme Court's opinion in *Mattatall.* In that case, the defendant's Sixth Amendment right to counsel was violated when a third party, in cooperation with police, allowed police to listen in on telephone conversations with the defendant during which he deliberately elicited incriminating statements from the defendant. In determining whether the defendant's statements were admissible for impeachment, the court applied the Supreme Court's balancing approach:

> "The essence of a criminal trial is its search for the truth. In no way should the exclusionary rules enunciated by the Supreme Court in either *Weeks, Miranda, Jackson, Massiah, Henry,* or *Moulton* be perverted by any defendant into a license to commit perjury. The defendant's obligation to speak truthfully during the trial is absolute and is not lessened in response to violations of the defendant's constitutional rights. Such voluntary statements, although inadmissible in the state's case in chief, are properly accessible to the state for impeachment of a defendant's false or inconsistent testimony. Prior opinions of the Supreme Court, on the issue of impeachment, would indicate that the use of this evidence is not constitutionally prohibited." *Mattatall,* 603 A.2d at 1115.

The majority's decision in this case runs contrary to the weight of authority of other jurisdictions that have considered this issue, and in doing so, expands exclusion jurisprudence beyond the limits of that ever recognized by the Supreme Court. "There is no

gainsaying that arriving at the truth is a fundamental goal of our legal system." *Havens,* 446 U.S. at 626. Today's decision seriously undermines the truth finding process of the adversary system by allowing criminal defendants to pervert the shield provided by the Sixth Amendment "to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances. *Hass,* 420 U.S. at 722. For these reasons, I dissent.

No. 94,002

IN THE COURT OF APPEALS OF

THE STATE OF KANSAS,

Appellee,

v.

DONNIE R. VENTRIS,

Appellant.

MEMORANDUM OPINION

Appeal from Montgomery District Court; Rawley J. (Judd) Dent II, judge. Opinion filed September 15, 2006. Affirmed.

Matthew J. Edge and *Rachel Pickering*, of Kansas Appellate Defender Office, for the appellant.

Linda E. DeWitt, of Phalen, Bicknell & Markle Law Offices, special counsel, *F. William Cullins*, county attorney, and *Phill Kline*, attorney general, for the appellee.

Before MALONE, P.J., GREEN, J., and BUKATY, S.J.

Per curiam: A jury acquitted Donnie Ray Ventris of felony murder and misdemeanor theft but convicted him of aggravated robbery and aggravated burglary. He appeals the convictions and raises three issues. First, did the trial court err in admitting statements Ventris made to a cellmate while awaiting trial? The court allowed the State to present the statements for impeachment purposes. Ventris

argues the statements were obtained in violation of his right to counsel under the Sixth Amendment to the United States Constitution. Second, did the court err in admitting evidence of a prior bad act toward a codefendant without giving a limiting instruction? Third, did the court err in imposing an enhanced sentence based upon prior convictions when the convictions were not proven beyond a reasonable doubt to a jury?

We conclude as follows. First, even though the statements to the cellmates were obtained in violation of Ventris' Sixth Amendment right to counsel, the trial court did not err in admitting them for impeachment purposes. Second, while the court improperly allowed the testimony about the prior bad act, it was harmless error. Third, the court did not err in using Ventris' prior convictions to enhance his sentence without requiring they be proved to a jury beyond a reasonable doubt. We affirm.

In view of the issues raised, a somewhat detailed recitation of the facts is necessary.

Sometime in the last part of 2003, Ventris met and began living with Rhonda Theel in a romantic relationship. At some point, Theel learned from another friend, Kim Eytcheson, about the victim in this case, Ernest Hicks. She heard that Hicks was abusing the children of his live-in girlfriend, Helen Cargile. She also heard that Hicks was wealthy and carried $500 to $600 on his person. Eytcheson was also a friend of Cargile.

On January 6, 2004, and into the early morning hours of January 7, 2004, Theel and Ventris were

using methamphetamine and marijuana at their home. Neither had slept for a couple days. At approximately 6 a.m., Theel suggested to Ventris that they go to Hicks' residence so she could talk to Hicks about the alleged child abuse. Theel called Eytcheson to find out when Cargile's children left for school. Theel also called another friend, Martha Denton, and asked Denton to meet her and Ventris at "Pump Station Road." Theel wanted Denton to give her and Ventris a ride to Hicks' residence, because she thought it would be best not to drive Ventris' car all the way to Hicks' house.

Denton did not know why Theel wanted to meet her at Pump Station Road. Nevertheless, she proceeded to the meeting place with her boyfriend, Keith Holt. By this time, Ventris and Theel had arrived at the meeting place in Ventris' truck and began watching Hicks' residence, waiting for Cargile to leave with her children. When Denton and Holt arrived, Theel asked Holt to take her and Ventris to Hicks' residence and told Denton to take Ventris' truck with her. Denton and Holt complied.

Theel gave Holt directions to Hicks' residence. She also told him that she and Ventris were going there so a guy could show them a dog. As they arrived at Hicks' residence, Theel noted that Hicks' truck was in the driveway and told Holt to drive past the house, turn around, head back towards the residence, and turn into the driveway next to Hicks' truck. Ventris "never said a word."

After Holt pulled into the driveway, Theel exited the vehicle and told Ventris to wait while she went to

the door and knocked. Theel had also told Holt he could leave, because the guy living at the house was supposed to give her and Ventris a ride back. According to Holt's trial testimony, Ventris waited behind a black pickup while Theel knocked on the door. As Holt pulled out of the driveway, he saw Ventris pull a ski mask down over his face, but Holt could not tell whether the ski mask left Ventris' face open or covered everything but his eyes. The outside temperature was 5 to 10 degrees that morning.

While Theel and Ventris were inside Hicks' residence, one or both of them shot and killed Hicks with a .38 revolver, took his wallet containing approximately $300, and a cell phone. Theel drove herself and Ventris in Hicks' truck to a secluded spot in Oklahoma where she sprayed the truck with cleaner to get rid of any fingerprints. The two of them then walked to a convenience store. On the way, Theel tried unsuccessfully to disassemble the murder weapon. One of them disposed of the gun in a culvert.

At the convenience store, Theel called Denton and asked her for a ride home. Denton and Holt eventually picked Theel and Ventris up at the store and took them back to their home in Kansas. Sometime later, Denton and Holt contacted the police after developing a suspicion that Theel and Ventris had something to do with Hicks' murder. Police arrested both Theel and Ventris and charged them each with several crimes.

Theel entered into a plea bargain in exchange for her testimony against Ventris. Specifically, she pled guilty to aggravated robbery and aiding a felon. The

State tried Ventris before a jury on charges of felony murder, aggravated robbery, aggravated burglary, felony theft, and misdemeanor theft. Theel, Ventris, and a former cellmate of Ventris' all testified at trial. Both Ventris and Theel denied taking a gun to Hicks' residence, and they both claimed the reason for going to the residence was for Theel to talk to Hicks about the alleged child abuse. However, each related a different version of the events that occurred after arriving at Hicks' residence.

Highly summarized, Theel testified as follows. As she was waiting for Hicks to come to the door, she saw a frightened look on Hicks' face and then Ventris quickly passed her and entered the house. She then entered and almost immediately saw Hicks on the floor and Ventris standing over him. She heard them arguing. She then saw that Ventris had a .38 revolver and heard him ask Hicks about money. She attempted to stop the two from arguing by dousing them with a cleaner she retrieved from the kitchen and by also hitting Hicks with a stick. Hicks produced a wallet and Ventris said, "All this for 40 or 50 dollars?" The two men walked to the bedroom after Hicks said he had more money there. Theel then heard two shots and saw Ventris come out of the bedroom. She claimed Ventris said, "I have to shoot him again," to which she responded, "Okay." According to her testimony, she then left the house and at some point heard a third shot. Ventris then came out of the house and threw Hicks' truck keys to her. She used the keys to gain access to Hicks' truck and drove herself and Ventris away from the scene.

Ventris, as one might anticipate, offered a different version as follows. He testified that he only went with Theel on the day in question to "shut her up" since she had been talking for days about Hicks committing child abuse. He denied hearing about Hicks and his money. He also denied taking a gun with him and did not know if Theel had one. He denied knowing that Theel had called Denton to arrange a ride, but he admitted going to the meeting place where they met Denton and Holt. There he and Theel entered Holt's car and traveled to Hicks' house. Once there, Hicks became agitated with Theel over her accusations of child abuse. A scuffle ensued between himself and Hicks, and Theel threw a liquid in Hicks face, and hit him with a stick. Theel then pulled out a gun and asked Hicks for his wallet. Ventris asked her what she was doing and she replied that he should mind his own business. Hicks said his wallet was in the bedroom and she told him to go get it. Theel and Hicks went into the bedroom, and Theel shot him. Ventris started to leave and then heard two more shots. He denied taking anything with him when he left. He got into the truck with Theel only after she said she would take him to his truck. Nevertheless, they continued on to a gas station where he purchased gas with money Theel gave him.

As stated earlier, the State also offered at trial the testimony of Johnnie Doser, Ventris' former cellmate, as a rebuttal witness. Prior to trial, the State recruited Doser to share a cell with Ventris and to "keep [his] ear open and listen" for incriminating

statements. According to Doser, Ventris told him that he and his girlfriend "went to rob somebody and that it went sour." Ventris allegedly said he shot a guy in the head and chest and took his keys, his wallet, about $350, and a vehicle. In exchange for Doser's testimony, the State released him from probation. Ventris objected to the testimony, claiming the State had obtained the statements in violation of his Sixth Amendment right to counsel. The State conceded the Sixth Amendment violation but argued the testimony could be used for impeachment purposes. The trial court allowed Doser to testify.

Prior to closing arguments, the trial court instructed the jury to "consider with caution" the testimony of both Doser and Theel. The jury deliberated for approximately 2 hours and acquitted Ventris of felony murder and misdemeanor theft. However, the jury found him guilty of aggravated burglary and aggravated robbery. The court had previously dismissed the felony theft charge due to a lack of evidence. Later, the court sentenced Ventris to 247 months for aggravated robbery and 34 months for aggravated burglary.

Prior Convictions

Initially, we will briefly address the argument that the trial court erred in using Ventris' previous convictions to enhance his sentence in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), in that the State did not prove them beyond a reasonable doubt to a jury. As Ventris recognizes, the Kansas Supreme Court has already decided this sentencing issue against his

position in *State v. Ivory*, 273 Kan. 44, 46, 41 P.3d 781 (2002). This court is duty bound to follow Kansas Supreme Court precedent absent some indication the court is departing from its previous position. *State v. Singleton*, 33 Kan. App. 2d 478, 488, 104 P.3d 424 (2005). There is no indication the Supreme Court is departing from its position in *Ivory* and, therefore, the trial court did not err in using Ventris' previous convictions to enhance his sentence.

Statements to a Former Cellmate

Ventris next argues the trial court erred in allowing the State to use for impeachment purposes incriminating statements obtained in violation of his Sixth Amendment right to counsel. The argument presents a question of law over which this court exercises unlimited review. *See State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003). In *Michigan v. Jackson*, 475 U.S. 625, 89 L. Ed. 2d 631, 106 S. Ct. 1404 (1986), the United States Supreme Court created a "prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation." *Michigan v. Harvey*, 494 U.S. 344, 345, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990). In *Harvey*, the Court found a statement obtained in violation of *Jackson* could be used for impeachment purposes, because the *Jackson* rule is merely a procedural safeguard that is not itself a right protected by the Constitution, and, therefore, the "'search for truth in a criminal case' outweighs

the" policies served by excluding the evidence. 494 U.S. at 351 (quoting *Oregon v. Hass*, 420 U.S. 714, 722-23, 43 L. Ed. 2d 570, 95 S. Ct. 1215 [1975]). The Court specifically left open the question of whether a "voluntary statement obtained [through police initiated discussion and] in the absence of a knowing and voluntary waiver" of the Sixth Amendment right to counsel can be used for impeachment purposes. 494 U.S. at 353-54.

The question left open in *Harvey* is precisely the issue presented here. The State accurately concedes that through the use of an informant, it initiated a discussion with Ventris in violation of his Sixth Amendment right to counsel. *See State v. McCorgary*, 218 Kan. 358, 363, 543 P.2d 952 (1975). On the other hand, Ventris has never argued his statements were involuntary, nor would such an argument seem reasonable under the facts here. Instead, he relies on *Harvey* and *New Jersey v. Portash*, 440 U.S. 450, 459, 59 L. Ed. 2d 501, 99 S. Ct. 1292 (1979), for the proposition that the trial court erred in admitting his incriminating statements for impeachment purposes, because he did not knowingly and voluntarily waive his right to counsel.

While its true that Ventris did not knowingly and voluntarily waive his Sixth Amendment right to counsel (*see McCorgary*, 218 Kan. at 362-63) the cases he relies on do not support his argument that his statements are inadmissible for impeachment purposes. As stated before, *Harvey* did not address this issue. Furthermore, *Portash* is inapplicable because it involved involuntary statements, which

the Supreme Court held are inadmissible for all purposes. 440 U.S. at 459. Moreover, Ventris' argument that he must have knowingly and voluntarily waived his right to counsel is being raised for the first time on appeal. "It is well established that '[t]he defendant cannot object to the introduction of evidence on one ground at trial and then assert a different ground on appeal.'[Citation omitted.]" *State v. Engelhardt*, 280 Kan. 113, 127, 119 P.3d 1148 (2005).

It appears courts are split on the issue presented here. *See People v. Brown*, 42 Cal. App. 4th 461, 472-74, 49 Cal. Rptr. 2d 652 (1996) (partially published decision filed February 1, 1996). The majority of jurisdictions that have addressed the issue, including the Tenth Circuit, have held statements taken in violation of the Sixth Amendment right to counsel (as opposed to the prophylactic rule) can be used for impeachment. *See Brown*, 42 Cal. App. 4th at 472 (citing, *e.g.*, United States v. McManaman, 606 F.2d 919 [10th Cir. 1979]). A review of the case law indicates the majority position on this issue has not changed since the California Court of Appeals recognized it in *Brown* in 1996.

In *McManaman*, the police secretly recorded a conversation between the defendant and an informant with an electronic transmitter worn by the informant. The defendant made incriminating statements the court concluded were obtained in violation of his Sixth Amendment right to counsel. Nevertheless, the court held the State could use the statements for impeachment purposes. 606 F.2d at

925. In so holding, the court found the defendant is not free to make a "sweeping denial" of the allegations against him, through "possibly perjurious testimony, [and] in reliance on the Government's inability to challenge his credibility." 606 F.2d at 925.

As did the defendant in *McManaman*, Ventris completely denied any involvement in the crimes charged. In accord with the majority rule we conclude the admission of Doser's testimony was not error. Not allowing the State to impeach a defendant with his or her own incriminating statements would weaken the integrity of a trial as a truth-seeking process.

Prior Bad Act

At the beginning of her testimony, Theel testified that "several things" caused her to fear Ventris. Over Ventris' objection, the trial court allowed the State to elicit testimony about a specific incident that occurred in December 2003, when Ventris searched Theel and forced her to take off her clothes out of a paranoid fear she had "picked something up" when retrieving her mail. Theel also testified her fear of Ventris caused her to purchase a .33 revolver after he moved in with her and took possession of her .38 revolver (the murder weapon). The court allowed this testimony despite Ventris' timely objection that it was evidence of a prior bad act inadmissible under K.S.A. 60-455. The court gave no limiting instruction regarding the evidence.

The State does not argue that K.S.A. 60-455 allows the admissibility of the disrobing incident under one of the factors listed there. Rather, it argues the

evidence was admissible independent of the statute as res gestae evidence and to establish the relationship between Ventris and Theel. "The admission of evidence independent of K.S.A. 60-455 is entrusted to the sound discretion of the trial court and will not be overturned absent a clear showing of abuse of that discretion." *State v. Carr*, 265 Kan. 608, 624, 963 P.2d 421 (1998).

In *State v. Engelhardt*, 280 Kan. 113, 126-27, 119 P.3d 1148 (2005), the Kansas Supreme Court has stated:

> "Kansas cases have recognized that '"acts done or declarations made before, during or after the happening of the principal occurrence may be admissible as part of the res gestae where the acts are so closely connected with it as to form in reality a part of the occurrence. [Citation omitted.]"' Res gestae evidence, although not proving part of the charged crime, has a natural, necessary, or logical connection to the crime. [Citation omitted.]"

The court also stated in *Carr*, 265 Kan. at 624:

> "[P]rior acts of a similar nature between the same parties is admissible independent of K.S.A. 60-455 where the evidence is not offered for the purpose of proving distinct offenses but rather to establish the relationship of the parties, the existence of a continuing course of conduct between the parties, or to corroborate the testimony of the complaining witness as to the act charged. [Citations omitted.]
>
> 'The primary test for determining whether evidence is admissible independently of K.S.A.

> 60-455 is its relevancy to the issue in question.'"

On appeal, the State argues the disrobing incident was "an example of the strange, unpredictable, and unexplainable things [Ventris] did during the course of [his and Theel's] relationship that made her fear for her safety." The State argues this was relevant to explain why Theel purchased a new gun. However, we fail to comprehend how Theel's purchase of a new gun was relevant in proving Ventris committed aggravated robbery, aggravated burglary, or felony murder, or how this incident which occurred in the month prior to the murder, was "so closely connected with [the principal occurrence] as to form in reality a part of" it. *Engelhardt*, 280 Kan. at 126-27.

Moreover, the State does not explain how the disrobing incident establishes the nature of the relationship, or a continuing course of conduct, between Ventris and Theel. It merely asserts the incident was one of "several occurrences" that showed why Theel thought Ventris was "scary." Again, it is unclear how Ventris' being "scary" has any relevant purpose other than to show he has a propensity for committing crime. While one might argue the evidence had a tendency to show Ventris exercised dominance over Theel and, thus, "called the shots" on the day of the murder, this theory of admissibility has never been recognized in Kansas. In *Engelhardt*, the Supreme Court observed:

> "Although the 'relationship of the parties' is frequently suggested as a basis independent of K.S.A. 60-455 to admit prior bad acts evidence,

> Kansas appellate courts have consistently limited it to evidence that establishes the relationship between the defendant and the victim—not the relationship between codefendants or between the defendant and a witness. [Citation omitted.]" 280 Kan. at 130.

We conclude that the prior disrobing incident did not constitute a part of the res gestae of the crimes charged. No relevance existed between this incident and the crimes charged against Ventris that would justify its admission. With no relevant purpose and the possibility it caused the jury to think Ventris had a propensity for committing crime and was deserving of punishment regardless of guilt, the trial court abused its discretion in admitting the evidence.

Our conclusion does not, however, end the inquiry. The harmless error analysis applies to the admission of prior crimes evidence. See *State v. Vinyard*, 32 Kan. App. 2d 39, 46, 78 P.3d 1196 (2003), *rev. denied* 271 Kan. 927 (2004). "Errors that do not affirmatively cause prejudice to the substantial rights of the defendant do not require reversal when substantial justice has been done. [Citation omitted.]" *State v. Kendall*, 274 Kan. 1003, 1010, 58 P.3d 660 (2002); see K.S.A. 60-261. The error is harmless only if we can declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. *State v. Boldridge*, 274 Kan. 795, 808, 57 P.3d 8 (2002), *cert. denied* 538 U.S. 950 (2003).

At trial, the primary dispute became a credibility contest between Ventris, Theel, and Doser. The jury clearly questioned Theel's and Doser's credibility,

because it acquitted Ventris of killing Hicks. Certainly, the jury also questioned Ventris' testimony, because it found him guilty of aggravated burglary and aggravated robbery. It did so after being instructed by the court to convict Ventris of these crimes only if it determined he entered Hicks' residence without authority and with the intent to commit a felony therein and, once inside, took Hicks' property by force and either inflicted bodily harm on Hicks or was armed with a dangerous weapon.

There was abundant testimony to prove the charges against Ventris over and above the testimony about the disrobing incident. Besides the direct testimony of Theel and Doser, there was much circumstantial evidence to refute Ventris' "along-for-the-ride" defense. This included the fact that Ventris had not slept for 2 days and had been doing drugs with Theel, who had heard that Hicks carried a lot of cash. Ventris never once questioned Theel about the strange arrangements she was making in preparation for going over to Hicks' residence, *i.e.*, the indirect route and asking someone else to drive there. Unquestionably, he went along voluntarily. By his own words, he later aided in Theel's escape. In addition, both Theel and Ventris stated the reason they went to Hicks' residence was to talk to him about child abuse allegations against him. It seems strange, if not very unusual, that two people with innocent motives would go to the house of a stranger for such purposes. There is also the fact Holt saw Ventris pull a ski mask over his face before entering Hicks' residence.

We conclude beyond a reasonable doubt that the erroneous admission of the disrobing incident had little, if any, likelihood of having changed the result of the trial. The ruling amounted to harmless error.

Affirmed.

OPPOSITION BRIEF

No. 07-1356

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petitioner,

v.

DONNIE RAY VENTRIS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 07-1356

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS, Petititioner,

v.

DONNIE RAY VENTRIS, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Donnie Ray Ventris respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Kansas Supreme Court in this case. That opinion is reported at 176 P.3d 920 (2008).

STATEMENT OF FACTS

Rhonda Theel and Mr. Ventris were introduced and began dating in September or October 2003. Ms. Theel moved in with Mr. Ventris a few weeks later.

Ms. Theel had heard from Kim Eytcheson that Ernest Hicks was abusing one of the children of his girlfriend, Helen Cargile. Ms. Cargile and Ms. Theel did not know each other very well, but they had a mutual acquaintance in Ms. Eytcheson, who was Ms. Cargile's ex-sister-in-law and was dating Ms. Cargile's ex-husband. Ms. Eytcheson told Ms. Theel that Mr.

Hicks usually carried several hundred dollars in cash. Ms. Theel wanted to confront him about the alleged abuse.

On January 7, 2004, Ms. Theel persuaded Mr. Ventris to come with her to Mr. Hick's house. Mr. Ventris, who later claimed not to know at that time that Mr. Hicks carried a lot of money, agreed to go with Ms. Theel so she would stop talking constantly about the alleged child abuse. Ms. Theel called Ms. Eytcheson to find out when Ms. Cargile's children went to school and Mr. Hicks would be alone at the house. Ms. Theel arranged for Martha Denton and Keith Holt to give her and Mr. Ventris a ride so Mr. Ventris would not have to take his truck.

Ms. Denton and Mr. Holt dropped them off at Mr. Hicks' house and drove away. They went inside Mr. Hicks' home. When they left in Mr. Hicks' pickup truck, Mr. Hicks had been shot in the torso and head, and lay dead on the floor of his home. Ms. Theel drove the truck to Oklahoma and parked it in a spot by the side of a gravel road. Ms. Theel sprayed down the truck with cleaner to remove fingerprints. They walked along the gravel road for a few hours. Along the way, Ms. Theel tried unsuccessfully to disassemble the gun that shot Mr. Hicks. The gun ended up in a culvert. Ms. Theel and Mr. Ventris eventually came to a roadside store, where they waited an hour for Ms. Denton and Mr. Holt to pick them up and return them to their home in Kansas.

Ms. Denton and Mr. Holt later suspected that Ms. Theel and Mr. Ventris may have been involved in the death of Mr. Hicks. Ms. Denton and Mr. Holt contacted the police. The State charged Mr. Ventris with one count each of felony murder, aggravated robbery, aggravated burglary, and misdemeanor theft. Ms. Theel pleaded down to just aggravated robbery and aiding a felon in return for her testimony against Mr. Ventris.

Ms. Theel and Mr. Ventris both testified at trial. According to Ms. Theel, she was unarmed when they went Mr. Hicks' home, and unaware that Mr. Ventris had a gun. She claimed she went to Mr. Hicks' door and knocked. She could see Mr. Hicks coming to the door. When she saw Mr. Hicks' eyes grow wide, she turned to see Mr. Ventris charging past her into the house. He supposedly struggled with Mr. Hicks, then produced the gun and demanded his wallet. Mr. Ventris was unhappy with the amount of money in the wallet. Mr. Hicks told him there was more money in the bedroom. He followed Mr. Hicks into the bedroom and shot him. Mr. Ventris supposedly shot Mr. Hicks two more times.

According to Mr. Ventris, he was unarmed and unaware that Ms. Theel had a gun. Ms. Theel went to Mr. Hicks' door while he stayed back. When Mr. Ventris came to the door, Ms. Theel was already across the threshold and Mr. Hicks said to come in and shut the door. Once inside, Ms. Theel began screaming at Mr. Hicks about the alleged abuse. Thinking Mr. Hicks might try to grab Ms. Theel, Mr. Ventris grabbed Mr. Hicks. The two men fell to the ground. As they struggled, Ms. Theel pulled out the gun and demanded Mr. Hick's wallet. Mr. Hicks said his wallet was in the bedroom. She followed Mr. Hicks into the bedroom and shot him. She shot him two more times.

In rebuttal to Mr. Ventris' testimony, the State called Johnnie Doser, whom the trial court permitted to testify over Mr. Ventris' objection. Mr. Doser was an inmate in the county jail at the time Mr. Ventris was there awaiting trial. Mr. Doser, who happened to be the stepbrother of a county corrections officer, had violated his probation and faced the possibility of having to serve a prison sentence. The prosecutor recruited him to be Mr. Ventris' cell mate. In return for gathering information from Mr. Ventris, the prosecutor agreed to release him from probation.

Mr. Doser testified that on his second day as Mr. Ventris' cell mate, he told Mr. Ventris that he had a troubled look, and asked what was on his mind. Mr. Ventris asked Mr. Doser if he could be trusted. Mr. Doser replied that he could. Mr. Ventris then asked if what he told Mr Doser would not leave their cell. Mr. Doser said that it would not. According to Mr. Doser, Mr. Ventris showed him his arrest warrant, then confessed that he and Theel "went to rob somebody and that it went sour. He'd shot this man in his head and in his chest. That he took his keys, his wallet, about $350.00, and took a vehicle."

The jury acquitted Mr. Ventris of felony murder and theft, and convicted him of aggravated robbery and aggravated burglary. Mr. Ventris filed a timely notice of appeal. On direct appeal, the Kansas Supreme Court reversed the conviction and remanded for a new trial. The State did not seek any stay of the order of the Kansas Supreme Court, and on February 28, 2008, the mandate of the Kansas Supreme Court was filed by the state trial court clerk.

On June 4, 2008, citing his right under a state speedy trial statute, Mr. Ventris moved for discharge from the current prosecution. On June 26, 2008, the state trial court heard and denied Mr. Ventris' motion. Further review of this order in the Kansas Supreme Court is expected at the time of filing this brief in opposition.

REASONS WHY THE PETITION SHOULD BE DENIED

1. **The split of authority on the question presented is not so deep and enduring as petitioner suggests; many of the cases petitioner cites do not actually address the question.**

   Petitioner frames the question presented as:

   > Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes – a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

Pet. i. The narrow framing of the question suggests that it does not frequently arise, and then only in cases where (1) the Sixth Amendment right to counsel has attached, (2) the defendant has made a statement without knowingly and voluntarily waiving that right, and (3) the prosecution has prosecution has offered that statement to impeach the defendant's testimony. Many of the cases petitioner cites as examples of lower courts addressing the question presented lack one of these elements.

In some of the cases petitioner cites, the Sixth Amendment right to counsel has not attached, or the defendant has not claimed a Sixth Amendment violation. There is no Sixth Amendment claim in *United States v. Stevens*, 935 F.2d 1380, 1393-94 (3rd Cir. 1991), only the issue of whether statements made to a federal pretrial services officer in a bail application are admissible for impeachment despite the confidentiality provisions of 18 U.S.C. § 3153(c)(1) and (c)(3). No Sixth Amendment right to counsel had attached in *McGriff v. Dep't of Corrections*, 338 F.3d 1231, 1235-36 (11th Cir. 2003), in which the issue was whether the petitioner's testimony in a § 2254 action, where the petitioner had only a statutory, not constitutional, right to counsel, could be used for impeachment in a subsequent hearing in the same action. Similarly, there was no Sixth Amendment right to counsel in *United States v. Demetsky*, 96 F.3d 454, 456-

457 (10th Cir. 1996), in which the government used the defendant's pleas in an Indian tribal court for impeach defendant's testimony, because the defendant did not have the right to counsel in tribal court, nor had the government yet indicted the defendant when he entered those pleas.

Many of the cases petitioner cites actually involve defendants who knowingly and voluntarily waived the right to counsel. *See, e.g. United States v. Laury*, 49 F.3d 145, 149 (5th Cir. 1995); *Bradford v. Whitley*, 953 F.2d 1008, 1009-10 (5th Cir. 1992); *United States v. Red Bird*, 146 F. Supp. 2d 993, 995 (C.D.S.D. 2001); *State v. Cherry*, 83 P.3d 123, 125 (Idaho Ct. App. 2003); *State v. Southworth*, 52 P.3d 987, 994 (N.M. Ct. App. 2002); *Trevino v. Alameida*, No. C 04-0720 MMC (PR), 2007 WL 781590 at *14 (N.D. Cal. Mar. 13, 2007). These cases do not support the proposition that there is a split of authority on the question presented, which petitioner correctly frames as one which the Court left open in *Harvey*, but instead support the proposition that the Circuits and state courts of last resort follow the rule the Court laid out in *Harvey*.

Finally, a few of the cases petitioner cites do not involve statements offered to impeach the defendant's testimony. The issue in *United States v. Fellers*, 397 F.3d 1090, 1095 (8th Cir. 2005), *abrogated on other grounds by United States v. Thorpe*, 447 F.3d 565, 597 n.3 (8th Cir. 2006), is not about the admissibility of the statements, but whether a later statement, made after the defendant had voluntarily and knowingly waived the right to counsel, was the fruit of an earlier, uncounseled statement. Similarly, the issue in *United States v. Danielson*, 325 F.3d 1054, 1067 (9th Cir. 2003), was not the use of the statements for impeachment, but whether the government's gathering of information about the defendant's trial strategy had led to a Sixth Amendment violation.

The Court does not need to grant certiorari to address the question presented. The fact that many of the cases petitioner cites in support of the proposition that there is a split of authority on question presented do not, in fact, actually address the question indicates that the split is not so deep and enduring as petitioner suggests. Many of the cases cited involve waivers and merely suggest that the lower courts follow *Harvey*.

2. The uncommon facts of this case result from the prosecution's use of disfavored practices and make it a poor case for considering the question presented.

Law enforcement agencies sometimes use jailhouse informants to investigate ongoing criminal enterprises or attempts to obstruct justice, but take various precautions to prevent abuse and ascertain that the information obtained is reliable. In this case, the prosecutor and law enforcement took few precautions to make sure Doser's testimony was reliable. The question presented implicitly pits the need to prevent possible perjury against the need to preserve the integrity of the adversarial process. The use of disfavored practices in recruiting Doser and procuring his testimony make this a problematic case for examining those considerations.

In *United States v. Massiah*, 377 U.S. 201, 207 (1964), this Court firmly established the rule that statements obtained from a defendant in violation of the right to counsel could not be used against him at trial. One of the policy goals of the exclusionary rule is to remove the incentives for the State to violate defendants' constitutional rights. *See Nix v. Williams*, 467 U.S. 431, 442-43 (1984). By including violations of the right to counsel within the exclusionary rule's ambit, the *Massiah* rule limited the usefulness of employing informants to obtain statements from defendants who had already been charged or indicted.

Nevertheless, the government still has use for informants to investigate ongoing criminal enterprises. *See Massiah*, 377 U.S. at 207. The government also uses informants to investigate attempts by defendants to obstruct justice by fabricating testimony and threatening government

witnesses. *See, e.g., United States v. McManaman*, 606 F.2d 919, 923 (10th Cir. 1979) (plans to kill government witnesses). This case does not involve either of those scenarios; the prosecutor recruited Doser solely to obtain statements to use in prosecuting Ventris on the charges in this case.

Doser testified in return for having his probation terminated after he had violated the terms of probation and faced having to serve the underlying prison sentence. Although Doser denied that he was promised anything in return for his testimony, he admitted that the government coincidentally released him from probation after he provided them with a statement. The trial court saw fit to instruct the jury to consider his testimony with caution.

In other cases where the government used an undercover informant, he or she has carried a recording or transmitting device so that the government has a record of the defendant's statement independent of the informant's recollection. An informant who agrees to provide testimony in return for special treatment has obvious incentives to lie. *See* Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63 (2002). Past experience demonstrates that informants can easily distort a defendant's words to make a discussion of the government's allegations seem like a confession. *See* Bloom at 65. Recording the conversation is an often simple expedient that provides an independent record of the defendant's statement and prevents the most obvious forms of abuse. In this case, however, the government did not record the alleged conversation between Doser and Ventris.

The government's conduct in recruiting Doser and procuring his testimony at trial betrays an utter disregard for any sort of procedural safeguard that would provide some minimal assurance that his testimony was reliable. The government recruited Doser, not to investigate an ongoing criminal enterprise or attempts to obstruct the prosecution, but simply to get additional

evidence against Doser in a case where Ventris and Theel were likely to implicate each other. The government reached out to the stepbrother of a county corrections officer and offered to terminate his probation in return for testimony about a conversation with Ventris of which there is no independent record.

The disregard for procedural safeguards makes this a poor case for examining the question presented. The question requires an examination of two competing interests in our criminal justice system. On one hand, our courts have a legitimate and fundamental interest in avoiding perjurious testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959). On the other hand, the Sixth Amendment right to counsel is fundamental to the adversarial process our courts use to find the truth. *See Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938). In essence, the question presented asks about the admissibility of testimony that would promote the former consideration at the expense of the latter. But the disregard for safeguards in recruiting Doser means his testimony is not particularly reliable, and does not particularly promote the truth-finding function of our court, while still undermining the right to counsel. The Court should not grant certiorari because this is a poor paradigm case for examining the competing considerations implicit in the question presented.

3. **Because Mr. Ventris is currently entitled to discharge from criminal liability under the Kansas speedy trial statute, there is an independent and adequate state law ground for reversing the convictions in this case; as a result, this Court lacks jurisdiction to consider this case.**

Procedural timeline

On February 1, 2008, the Kansas Supreme Court issued its decision reversing the conviction in this matter. Petitioner did not file a motion for rehearing and did not file any motion to stay the mandate of the Kansas Supreme Court. As a result, on February 25, 2008, the

Kansas Supreme Court issued its mandate to the state trial court. This clerk of the state trial court received and filed the mandate on February 28, 2008. See Appendix "A".

On or about February 27, 2008, petitioner filed a pleading in the state trial court titled "Notice of Appeal to the United States Supreme Court," which indicated its intent to file a petition for a writ of certiorari and reflecting the time limits for such a petition. See Appendix "B".

On April 28, 2008, petitioner filed its petition for a writ of certiorari with this Court.

On June 4, 2008, Mr. Ventris filed a motion in state trial court seeking discharge pursuant to state law based on the failure of the state to retry him in compliance with state statute. See Appendix "C". On June 26, 2008, the state trial court held a hearing and denied the motion, citing K.S.A. 22-3604, governing appeals by the prosecution. The state trial court held that this statute applied, adopting petitioner's argument that a petition for a writ of certiorari is equivalent to an appeal by the prosecution under the statute. Further review by the Kansas Supreme Court is pending.[1]

Discharge under Kansas statute

K.S.A. 22-3402(1) provides that

> If any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged.

K.S.A. 22-3402(6) covers the precise situation where a criminal defendant obtains a reversal on appeal. "[i]n the event . . . a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided for herein shall commence to run from . . . the date the mandate of the supreme court or court of appeals is filed in the district court." *See also State v.*

---

[1] Although resolution of the issue regarding Mr. Ventris' claim for discharge is not final, by Rule "Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition." Rule 15.4. If and when a final resolution of this claim is issued by the Kansas Supreme Court, counsel for respondent will file a supplemental brief pursuant to Rule 15.8.

Clements, 244 Kan. 411, 413, 536, 694 P.2d 407 (1985). Therefore, petitioner had 90 days from February 28, 2008 in which to bring Mr. Ventris to trial; that time ended on May 28, 2008. As of that date, pursuant to state law, Mr. Ventris was entitled to final discharge.

A petition for a writ of certiorari to the United States Supreme Court does not stay the judgment of a lower court. *See, e.g., Lawrence v. St. Louis.-S.F. Ry.*, 278 U.S. 228, 232 (1929) (United States Supreme Court appeal does not operate as a supersedeas) *See generally* Robert L. Stern, et al, Supreme Court Practice § 17.10 (8th ed. 2002)("Neither the filing nor the granting of a petition for certiorari operates as a stay, either with respect to the execution of the judgment below or the issuance of the mandate below to a lower court.").

Petitioner might have sought a stay of the Kansas Supreme Court's mandate and has done so in other cases where it contemplated certiorari litigation. *See State v. Marsh*, Appeal No. 81,335 (motion for stay of mandate filed December 17, 2004 and granted December 20, 2004), rev'd by *Kansas v. Marsh*, 548 U.S. 163 (2006). But petitioner did not seek any stay in this case from the Kansas Supreme Court or this Court.

Discharge is adequate and independent state ground for reversal

Mr. Ventris acknowledges the general proposition that issuance of a mandate and execution of a judgment by a lower court does not deprive this Court of certiorari jurisdiction. *See United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983); *Aetna Cas. & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947). But this general proposition presupposes that the new judgment can be "undone" at a later date.

This Court's jurisprudence makes it clear that, in certain circumstances, a judgment entered in conformity with a state appellate court mandate would deprive this Court of jurisdiction. In fact, such circumstances are the practical basis for one of the exceptions to the

final judgment requirement found in 28 U.S.C. § 1257(3). When considering a claim that a state supreme court judgment suppressing evidence was not "final," this Court noted that if the defendant was convicted on retrial, the suppression issue would be moot. "In the event respondent was successful in obtaining an acquittal on retrial, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. 1257(3) (1964 ed.), we denied the motion [to dismiss]." *California v. Stewart*, 384 U.S. 436, 499 n.71 (1966); *see New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984) (same).

Similarly, by failing to obtain a stay of mandate and allowing the state statutory speedy trial clock to run in this case, there is now an adequate and independent state ground for reversing the conviction. And in such situations, this Court lacks jurisdiction:

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its view of federal laws, our review would amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 1225-126 (1945) (quoted in Stern, § 3.22 at 196).

This is exactly the situation at hand. Even if this Court would grant the writ of certiorari and reverse the Kansas Supreme Court's opinion in this case, Mr. Ventris is still entitled to discharge. The mandate of the Kansas Supreme Court lawfully issued effective February 28, 2008. By Kansas statute, petitioner was required to bring Mr. Ventris to trial within 90 days of the filing of the mandate. On May 29, 2008, Mr. Ventris became entitled to absolute discharge. As noted in *Pitcairn*, any review in this case would be nothing but advisory with regard to Mr. Ventris' case.

Because, regardless of this Court's decision, Mr. Ventris is entitled to discharge pursuant to Kansas statute, there is an adequate and independent state ground supporting reversal of the conviction in this matter. In such circumstances, this Court lacks jurisdiction and should dismiss the state's petition for writ of certiorari.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF

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No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes—a question the Court expressly left open in *Harvey* and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

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REASONS FOR GRANTING THE WRIT

Respondent acknowledges that there is a longstanding split of authority on the question presented in the petition for a writ of certiorari. Brief in Opposition (hereinafter "Opp.") at 7 (implicitly acknowledging the split of authority by arguing only "that the split is not so deep and enduring as petitioner suggests"). Furthermore, Respondent acknowledges that the Question Presented is one which the Court itself expressly reserved in *Michigan v. Harvey*, 494 U.S. 344, 354 (1990). Opp. 6 ("petitioner correctly frames [the question presented] as one which the Court left open in *Harvey*").

Respondent's arguments in opposition do nothing to undermine the certworthiness of the Petition, and with respect to the claim of an adequate and independent state ground, Respondent is simply wrong. Respondent's arguments are an effort to muddy waters which are in fact crystal clear. The Petition should be granted to address an important issue that has divided the lower courts.

I. Respondent Acknowledges A Split Of Authority On The Precise Constitutional Issue Presented In This Case

Respondent's protestations to the contrary, there is a well-established, enduring split of authority in the Circuits and state courts of last resort on the precise issue this Petition presents. The split is well-documented, and the cases identified and briefly described, in the Petition on pages 12–17. An objective examination of the cases will quickly verify

the split of authority. Furthermore, the Petition is careful not to overstate the holdings and decisions of the cited cases, using parentheticals to indicate where the relevant statement of law may have been dicta or the facts a little unusual.

Even if one were to eliminate from consideration all of the cases that Respondent claims are not part of the split—ten in all, including four that Petitioner recognizes do not "count" because they are intermediate state appellate court or federal district court decisions—there remain on each side of the split many cases whose legitimacy Respondent does not contest. (To be clear, Petitioner is neither conceding nor agreeing that the cases Respondent discusses are in fact distinguishable; rather Petitioner is simply suggesting that even if the Court were to accept all of Respondent's allegations as true, there remains a significant conflict of authority.)

First, Respondent does not question the following cases which, like the Kansas Supreme Court, hold that the statements at issue are inadmissible for any purpose: *State v. York*, 705 A.2d 692, 695 (Me. 1997); *Simpson v. United States*, 632 A.2d 374, 382 (D.C. 1993); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992); *United States v. Abdi*, 142 F.3d 566 (2d Cir. 1998).

Second, Respondent does not question the following cases holding that such statements remain admissible for impeachment purposes: *United States v. Bender*, 221 F.3d 265, 271 (1st Cir. 2000); *United States v. Yancey*, No. 97-4893, 1998 WL 393972, at

*2 (4th Cir. July 10, 1998); *United States v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000); *United States v. McManaman*, 606 F.2d 919, 925 (10th Cir. 1979); *State v. Conway*, 842 N.E.2d 996, 1020 (Ohio), *cert. denied*, 127 S. Ct. 122 (2006); *State v. Mattatall*, 603 A.2d 1098, 1114 (R.I. 1992).

There is a significant split of authority—with Circuits and state courts of last resort on each side—and it is enduring, with two state supreme courts reaching contrary conclusions just in the last two years (Ohio in 2006, Kansas in 2008). Further, Respondent does not and could not question that the Kansas Supreme Court recognized in this case that its decision added to an existing split of authority. Pet. App. 17a–20a. Add the fact that the Court expressly recognized and left open this very issue in *Michigan v. Harvey*, and this case is the epitome of "certworthy."

II. There Is No Independent And Adequate State Ground In This Case

By far, Respondent's most remarkable assertion is that there is an independent and adequate state ground for the Kansas Supreme Court's decision in this case. With all due respect, Respondent's suggestion is patently erroneous.

First, the Court will look in vain for any hint or suggestion of any state ground—much less an independent and adequate one—in the Kansas Supreme Court's opinion in this case. *See* Pet. App. 1a–48a. There is simply nothing in the opinion mentioning, suggesting, or even hinting at a state

law ground on which the Kansas Supreme Court might have relied in reaching its decision in this case. And with good reason—there is no such ground. The Kansas Supreme Court addressed only the *Michigan v. Harvey* issue, and clearly rested its decision *solely* on federal grounds. *See* Pet. App. 23a ("The admission of the evidence violated Ventris' Sixth Amendment right to counsel.")

Second, the independent and adequate state ground that Respondent asserts has no basis in either fact or law. With respect to facts, Respondent wants to ignore that his erroneous argument that the Kansas Speedy Trial Act has been violated was rejected by the trial court. *See* Appendix to this Reply 1a–3a. As a factual matter, Respondent's entire argument relies upon a premise that is simply not true; indeed Respondent's factual premise is demonstrably false.

More importantly, Respondent's false factual premise is irrelevant as a matter of law. Even assuming for the sake of argument that the speedy trial clock has run and Respondent cannot be retried in state court on the charges at issue in this case, that would not alter this Court's jurisdiction in any way, shape or form. Respondent wisely does not contest the well-established legal principle "that issuance of a mandate and execution of a judgment by a lower court does not deprive this Court of certiorari jurisdiction." Opp. 11 (citing the cases Petitioner presented in opposing Respondent's motion for discharge in the state trial court). That

proposition is crystal clear. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983) (The Court has jurisdiction in a criminal case—even when the lower court reversed a conviction, the mandate issued, and the trial court dismissed the case—because a reversal by the Supreme Court will reinstate the former conviction and sentence); *Aetna Cas. & Surety Co. v. Flowers*, 330 U.S. 464, 467 (1947) (issuance of a lower court's mandate does not defeat the Supreme Court's jurisdiction).

Remarkably, Respondent argues that this case is not controlled by the general rule, because somehow if Respondent was discharged on speedy trial grounds a decision of this Court reversing the Kansas Supreme Court could be given no effect. Not surprisingly, Respondent fails to explain why that would be so, and Petitioner is at a loss to comprehend the argument.

Contrary to Respondent's assertion, and assuming again for the moment Respondent's erroneous factual premise that the speedy trial clock has run and Respondent cannot be retried in state court, this case would present precisely the situation in *United States v. Villamonte-Marquez*, where the district court had dismissed the indictment against Respondent while this Court considered the prior appeal. What the Court held in *Villamonte-Marquez* applies equally (and logically) here: even if Kansas could not retry Respondent on the charges in this case, a reversal by this Court of the Kansas Supreme Court's decision necessarily would reinstate

Respondent's prior convictions and sentences, with no further state proceedings required.

Thus, a decision by this Court on the Sixth Amendment issue is in no sense an "advisory" opinion, as Respondent also erroneously suggests. Nor would any further proceedings or another trial be necessary to hold Respondent validly convicted and sentenced. All that would be required is that Respondent finish serving his prior sentences. In fact, lower courts have gone much further than the situation presented in *Villamonte-Marquez* and this case in recognizing the scope of this Court's certiorari jurisdiction. *Cf. United States v. Perez*, 110 F.3d 265, 266–67 (5th Cir. 1997) (holding that defendant could be prosecuted even where the Court of Appeals mandate dismissing the charges had issued and the district court had dismissed the indictment *before* the Government even filed a petition for a writ of *certiorari* in the Supreme Court seeking reversal of the Court of Appeals' decision).

This Court has jurisdiction over this case and the important federal question it presents. Respondent's contrary assertion is both factually and legal wrong—indeed, it is wishful thinking at best.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2008

APPENDIX

[Filed June 26, 2008]

IN THE DISTRICT COURT

Montgomery County, Kansas

STATE OF KANSAS,

Plaintiff,

v. CASE NO. 04 CR 24 I (C)

DONNIE RAY VENTRIS,

Defendant.

JOURNAL ENTRY

NOW on this 26th day of June, 2008, the above-entitled action comes on for hearing on the defendant's Motion for Discharge. The State appears by and through its counsel, Jared S. Maag, Deputy Solicitor General, Kevin Graham, Assistant Attorney General, and Stephen R. McAllister, Solicitor General. The defendant does not appear in person, but by and through counsel, Randall L. Hodgkinson and Matthew J. Edge of the Kansas Appellate Defendant's Office.

WHEREUPON, the parties supplement their pleadings with argument as to whether the defendant's right to a speedy trial has been violated in accordance with K.S.A. 22-3402(6).

WHEREUPON, the Court finds that the Mandate in this case was filed in the District Court on February 28, 2008, and that under K.S.A. 22-3402(1) the State had 90 days to retry petitioner from the reversal of his conviction in *State v. Ventris*, 285 Kan. 595, 176 P.3d 920 (2008). That the State, on April 28, 2008, filed a petition for certiorari with the United States Supreme Court to review the Kansas Supreme Court's decision in *State v. Ventris*. That from February 28, 2008 until June 10, 2008, defendant was held in custody "solely by reason" of the crime charged in the above-captioned case.

WHEREUPON, the Court finds that in accordance with K.S.A. 22-3604(2), the filing of the petition for certiorari by the State tolled the limitations period in this matter.

WHEREUPON, the Court further finds that from February 28, 2008 (mandate issued date) to April 28, 2008 (petition for certiorari filed) a period of 60 days elapsed which are now counted against the State under K.S.A. 22-3402(1).

WHEREUPON, the State is ordered to inform this Court of the resolution of this matter now pending before the United States Supreme Court; and further informs the parties that the limitations period will again run upon an order or decision by the United States Supreme Court.

WHEREUPON, the Court finds that the defendant's Motion for Discharge, should be, and is HEREBY DENIED.

IT IS SO ORDERED

/s/ Roger Gossard
The Honorable Roger Gossard
District Court Judge
Fourteenth Judicial District
Montgomery County

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AMICUS CURIAE BRIEF

94 (2)

No. 07-1356

FILED

MAY 29 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Supreme Court

BRIEF OF AMICI CURIAE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, IDAHO, IOWA, MICHIGAN, NEW HAMPSHIRE, OKLAHOMA, UTAH AND VIRGINIA ON BEHALF OF PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes – a question the Court expressly left open in *Harvey*, and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

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INTEREST OF THE AMICI CURIAE

The Amici Curiae States appear in support of Petitioner, the State of Kansas. Supr. Ct. Rule 37.[1]

The Amici have a significant interest in the question presented by the Petition, which has the potential to affect dramatically the conduct of criminal trials across the Nation. As demonstrated by the Petition, cases around the country are hopelessly split, and the issue has been "percolating" since the Court specifically reserved ruling on it 18 years ago. *Michigan v. Harvey,* 494 U.S. 344, 354 (1990). This case is an ideal vehicle for resolving the split because it presents only the one issue, and that issue was the sole basis for the decision below.

SUMMARY OF ARGUMENT

The Kansas Supreme Court majority's opinion removes key credibility determinations from the jury. In doing so, it has effectively recognized a constitutional right to commit perjury, in direct contravention of *Nix v. Whiteside,* 475 U.S. 157, 173 (1986); *Harris v. New York,* 401 U.S. 222, 225 (1971); and *Walder v. United States,* 347 U.S. 62, 65 (1954). This Court has previously excluded a criminal defendant's statements for all purposes only when the statements

[1] As required by Supr. Ct. Rule 37.2(A), counsel for Respondent was given timely notice of Amici's intent to file this brief.

were compelled. In other situations, a witness's statements, however obtained, may be used for impeachment purposes. The distinction drawn by the Court is based on constitutional principles whose surpassing importance is not recognized in the majority's opinion. The majority explicitly holds that, under the Sixth Amendment, "truth-seeking" – that is, engagement with objective reality – is not an overriding concern of the criminal justice system. Appendix at 19a. That holding is contrary to any concept of true justice.

ARGUMENT

I. The Kansas Supreme Court's Majority Opinion, in Practical Effect, Recognizes a Constitutional Right to Commit Perjury.

The majority opinion of the Kansas Supreme Court describes its intended effect clearly: "to prohibit the State from recruiting undercover informants to obtain statements once a prosecution has commenced without a knowing and voluntary waiver of the defendant's Sixth Amendment right to counsel." Appendix at 22a. That effect, of course, would be indirect, mediated through police officers and prison officials.

Even accepting for purposes of argument that the majority's rule of total exclusion will have that indirect effect, it will also have a far more certain *direct* effect. It will, in specified circumstances, prevent the jury from learning that a witness has, on a previous

occasion, said something diametrically opposed to his or her sworn testimony.

The majority's rule removes from the jury three interrelated credibility determinations: whether the informant is telling the truth in his or her rebuttal testimony; and, if so, whether the defendant lied under oath at trial; or whether the defendant instead lied to the informant.

In the present case, the majority explicitly rejects "truth-seeking" as the criminal law's overriding principle. Appendix at 20a. "[T]ruth-seeking", in this context, means nothing more or less than accurate factfinding by the jury. The majority concludes the "error" was not harmless because "[w]ithout the jailhouse informant's testimony, the jury might have considered Ventris' story more believable and acquitted him on all of the counts." Appendix at 23a. In other words, the particular constitutional harm was that the jury was permitted to perform its constitutional function effectively. *Ramonez v. Berghuis*, 490 F.3d 482, 490 (6th Cir. 2007) ("our Constitution leaves it to the jury, not the judge, to evaluate the credibility of witnesses in deciding a criminal defendant's guilt or innocence").

The result reached by the Kansas Supreme Court majority, while justified by citations to the Sixth Amendment and this Court's precedent, is actually contrary to the Sixth Amendment principles found in that precedent.

First and foremost, this Court has "mandated the exclusion of reliable and probative evidence for all purposes only when it is derived from involuntary statements." *Michigan v. Harvey,* 494 U.S. 344, 351 (1990); *New Jersey v. Portash,* 440 U.S. 450, 458-59 (1979); *Mincey v. Arizona,* 437 U.S. 385, 398 (1978). This Court has consistently observed the distinction between voluntary and involuntary statements. *See also, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 235-44 (1973). The distinction is not arbitrary. On the contrary, it is supported by two powerful rationales. First, in cases involving volunteered statements, the deterrent purpose of the exclusionary rule is fully satisfied by exclusion from the prosecution's case in chief, because there is little realistic incentive for a police officer to violate constitutional restrictions on evidence-gathering in the hope that the suspect might someday contradict him- or herself under oath on the particular topic. Only an irrational officer would knowingly violate the Constitution based on such a wan hope, and irrational officers are beyond the reach of the exclusionary rule anyway. *Hudson v. Michigan,* 547 U.S. 586, 596 (2006) ("the value of deterrence depends upon the strength of the incentive to commit the forbidden act"); *Nix v. Williams,* 467 U.S. 431, 446 (1984); *Oregon v. Hass*, 420 U.S. 714, 723 (1975).

Moreover, the intended deterrent effect of the majority's rule of total exclusion is far broader than required by the Sixth Amendment, which does not prohibit for all purposes the investigation of persons

facing criminal charges, but only the use of evidence uncovered by such methods in trials on the then-pending charges. *Texas v. Cobb,* 532 U.S. 162, 171-72 (2001); *Maine v. Moulton,* 474 U.S. 159, 178-80 (1985).

But there is also an even more fundamental and important reason for the Court's disparate treatment of voluntary and involuntary statements. This principle is frequently expressed in negative terms: "a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson,* 522 U.S. 262, 266 (1998).

The same principle is just as frequently phrased in positive terms: "when a defendant takes the stand, 'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Portuondo v. Agard,* 529 U.S. 61, 69 (2000) (quoting *Brown v. United States,* 356 U.S. 148, 154 (1958)). These principles are two sides of the same coin. The point is not simply that the defendant is *dis*entitled to commit perjury. Once the defendant has chosen to submit his or her credibility to the jury's evaluation, the jury is *entitled* to evaluate it. *See Wright v. West,* 505 U.S. 277, 296 (1992) (plurality) ("the jury was entitled to discount [the defendant]'s credibility").

By prohibiting the jury from learning that a witness has, on a prior occasion, said something contrary to his or her testimony under oath at the trial, the Kansas Supreme Court effectively recognized a constitutional right to commit perjury in certain circumstances, in flat contradiction to *Nix v.*

Whiteside, 475 U.S. 157, 173 (1986); *Harris v. New York,* 401 U.S. 222, 225 (1971); *Walder v. United States,* 347 U.S. 62, 65 (1954). The majority also diminished the jury's constitutional authority as factfinder, a result difficult to square with the Sixth Amendment principles announced in, *e.g., Blakely v. Washington,* 542 U.S. 296, 305-06 (2004) ("the right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *Apprendi v. New Jersey,* 530 U.S. 466, 482-90 (2000).

To justify that result, the majority rejected the underlying rationale of the very precedents that require total exclusion under the Fifth Amendment in certain circumstances, as shown in the following part of this brief.

II. Involuntary Statements Are Treated Differently than Voluntary Statements Based on the Text of the Fifth Amendment, and Considerations of Reliability and Morality.

In *Portash,* the defendant was compelled to testify under a grant of immunity. 440 U.S. at 451. The trial judge ruled that his compelled testimony could be used for impeachment. *Id.* at 452. The Court rejected that ruling:

> [T]he State asks us to weigh *Harris v. New York,* 401 U.S. 222, and *Oregon v. Hass,* 420 U.S. 714. Those cases involved the use of statements, concededly taken in violation of *Miranda v. Arizona,* 384 U.S. 436, to impeach

> a defendant's testimony at trial. In both cases the Court weighed the incremental deterrence of police illegality against the strong policy against countenancing perjury. In the balance, use of the incriminating statements for impeachment purposes prevailed. The State asks that we apply the same reasoning to this case. . . .
>
> But the State has overlooked a *crucial* distinction between those cases and this one. In *Harris* and *Hass* the Court expressly noted that the defendant made "no claim that the statements made to the police were coerced or involuntary," . . . That recognition was *central* to the decisions in those cases.

Id. at 458-59 (italics added; footnote omitted).

In the present case, the majority of the Kansas Supreme Court implicitly but necessarily concluded that the distinction drawn in *Portash* was neither "crucial" nor "central" to a proper Sixth Amendment analysis of the evidence at issue. Amici disagree.

The majority put Respondent's unguarded remarks to his cellmate in the same category as the involuntary statements at issue in *Mincey,* which the Court ruled could not be used for any purpose, including impeachment. 437 U.S. at 398. In *Mincey,* the defendant was in the intensive care unit, drugged, in pain from a bullet wound, with a tube down his throat, when he was subjected to four hours of interrogation. Justice Stewart's opinion for the Court summed up: "He was, in short, 'at the complete mercy'

of Detective Hust, unable to escape or resist the thrust of Hust's interrogation." *Id.* at 399 (citation omitted). It can hardly be maintained that Respondent was in a comparable position when he volunteered his remarks to his cellmate.

Furthermore, the total exclusion of compelled self-incrimination is required by the Constitution's explicit text, the significance of which point is emphasized in the Court's recent Sixth Amendment jurisprudence, *see, e.g., Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis v. Washington,* 547 U.S. 813, 824 (2006); and is further justified by obvious concerns about the quality of evidence, so that *exclusion* of compelled statements may well further truth-seeking; and by deep-seated convictions regarding the relationship of the state to the individual. Freedom from official maltreatment, after all, is the only right guaranteed twice in the Bill of Rights, in both the Fifth and Eighth Amendments.

All of these various factual and doctrinal considerations support the rule of total exclusion adopted in *Mincey* and *Portash.* None supports the total exclusion of voluntary statements made to a cellmate, based solely on the cellmate's allegiance of the moment. *Cf.* Appendix at 22a (different result called for if the cellmate switches sides *after* the conversation).

It is noteworthy that the Kansas Supreme Court's majority opinion did not cite *Mincey* or *Portash*; only the dissent did so. Appendix at 42a. Thus the majority did not consider whether there was any

principled basis for this Court's precedents establishing that involuntary statements belong in a different constitutional category than those obtained without, or in violation of, *Miranda* warnings. That is, the majority did not consider whether deeper principles were involved, but rather saw its task as simply choosing between "two analytical approaches", Appendix at 19a, rather in the style of a shopper selecting items from a supermarket shelf. The majority concluded that one approach would discourage behavior of which it disapproved, Appendix at 21a, and made its decision as if no principle more significant than its disapprobation were at stake.

Amici submit that, on the contrary, principles of surpassing importance are at stake, as shown in the final part of this brief.

III. As Then-Judge Kennedy Wrote, "It Is a Disturbing Indictment of Our System of Justice" that a State Supreme Court Would Conclude that the Sixth Amendment Is Hostile to the Pursuit of Truth.

"A trial ideally is a search for the truth". *Agard,* 529 U.S. at 77 (Ginsburg, J., dissenting). The truth cannot be arrived at by concealing relevant information from the jury. On the contrary, this Court has recognized that "the need for information in the criminal context" is especially weighty. *Cheney v. United States District Court,* 542 U.S. 367, 384 (2004). The criminal justice system has a "'fundamental' and 'comprehensive'

need for 'every man's evidence'". *Id.* (quoting *United States v. Nixon,* 418 U.S. 683, 709-10 (1974)). The majority of the Kansas Supreme Court held that the system not only did not need one man's evidence, but positively rejected it.

In *Banks v. Dretke,* 540 U.S. 668 (2004), the Court emphasized "the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Id.* at 696 (quoting *Stickler v. Greene,* 527 U.S. 263, 281 (1999)). That is a role embraced by most prosecutors as a matter of professional pride. But in the following passage the Kansas Supreme Court's majority denied that judges have a duty to the truth comparable to that imposed on prosecutors:

> Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights.

Appendix at 20a.

The card-game metaphor in the quoted passage seems almost too appropriate, for the passage encapsulates the sporting theory of courtroom procedure, by which the judge's sole duty is to enforce the rules of the game without regard to truth and justice. Roscoe Pound, "The Causes of Public Dissatisfaction with the Administration of Justice," 40 Am. L. Rev. 729, 738-39 (1906).

Twenty-nine years ago, then-Judge Kennedy emphatically rejected the contention that it was error to instruct the jury to seek the truth:

> It is a disturbing indictment of our system of justice that an attorney can argue to the court that it is error to instruct the jury to seek the truth. Perhaps both the substance of the argument and the fact that the attorney chooses to make it to the court indicates his agreement with a statement of Socrates that "in the law courts nobody cares a rap for the truth. . . ." Plato, Phaedrus, in Collected Diologues 272d (E. Hamilton ed. 1963). We, who take a grander view of our process, reject the suggestion[.]

United States v. Goodlow, 597 F.2d 159, 163 (9th Cir. 1979) (ellipsis in original).

Amici submit that it is a far more disturbing indictment of our system of justice that a state supreme court should have *accepted* the thrust of that argument.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari and reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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JOINT APPENDIX

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

JOINT APPENDIX

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12.	08-JUN-05	MOT. FOR EXT. OF TIME TO FILE BRIEF / 1ST, 2ND & 3RD MOTION – DONNIE VENTRIS
13.	21-JUN-05	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 9/6/05 BR – DONNIE RAY VENTRIS
14.	06-SEP-05	MOT. FOR EXT. OF TIME TO FILE BRIEF / 4TH MOTION – DONNIE VENTRIS
15.	20-SEP-05	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 10/5/05 BR – DONNIE VENTRIS "FINAL EXT"
16.	13-OCT-05	MOTION TO FILE BRIEF INSTANTER / DONNIE RAY VENTRIS
17.	13-OCT-05	ORD GRANTING MOT TO FILE BRIEF INSTANTER / DONNIE VENTRIS
18.	13-OCT-05	BRIEF RECEIVED / DONNIE RAY VENTRIS – APLE BRF DUE 11/15/2005
19.	15-NOV-05	MOT. FOR EXT. OF TIME TO FILE BRIEF / 1ST & 2ND MOTION – STATE OF KANSAS
20.	29-NOV-05	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 1/17/2006 BR – STATE OF KANSAS

21.	17-JAN-06	MOT. FOR EXT. OF TIME TO FILE BRIEF / 3RD MOTION – STATE OF KANSAS
22.	30-JAN-06	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 2/16/2006 BR – STATE OF KANSAS
23.	16-FEB-06	MOT. FOR EXT. OF TIME TO FILE BRIEF / 4TH MOTION – STATE OF KANSAS
24.	21-FEB-06	ORD. GRANTING EXT. OF TIME. TO FILE BRF. / DUE 2/28/2006 BR – STATE OF KANSAS, FINAL EXT
25.	23-FEB-06	BRIEF RECEIVED / STATE
26.	06-MAR-06	RECORD ORDERED FROM CLERK, DIST. CT. / MONTGOMERY COUNTY
27.	13-MAR-06	RECORD RECEIVED – CLERK, DISTRICT COURT / 8 VOLUMES (2 RRPS), MONTGOMERY COUNTY
28.	30-MAR-06	CAUSE SCHEDULED FOR HEARING / TUES 06/20/06 9:00 AM – TOPEKA
29.	15-SEP-06	JUDGMENT DOCKETED-OPINION FILED / AFFIRMED – PER CURIAM
30.	15-SEP-06	UNPUBLISHED OPINION / 16 PAGES – $4.00

KANSAS SUPREME COURT

31.	16-OCT-06	PETITION FOR REVIEW / DONNIE RAY VENTRIS
32.	14-FEB-07	PETITION FOR REVIEW – GRANTED / DONNIE RAY VENTRIS
33.	16-FEB-07	ADDITIONAL BRIEF REC'D – PETITION FOR REV. / DONNIE RAY VENTRIS
34.	02-MAR-07	ADDITIONAL BRIEF REC'D – PETITION FOR REV. / STATE
35.	16-MAR-07	SUPPLEMENTAL BRIEF / DONNIE RAY VENTRIS
36.	14-JUN-07	CAUSE SCHEDULED FOR HEARING / WED 09/05/07 9:00 AM
37.	04-SEP-07	MEMO NOTATION / 6.09(B) LETTER – DONNIE RAY VENTRIS
38.	01-FEB-08	JUDGMENT DOCKETED – OPINION FILED / JUD COA AFF DCT IS REV. JUD DCT IS REVERSED. – ROSEN, J.
39.	01-FEB-08	PUBLISHED OPINION / 53 PAGES – $13.25
40.	25-FEB-08	MANDATE ISSUED / CLERK, MONTGOMERY COUNTY
41.	28-FEB-08	RECORD RETURNED TO CLERK, DISTRICT COURT / 8

		VOLUMES (2 RRPS), MONTGOMERY COUNTY (I)
42.	05-MAY-08	MEMO NOTATION / WRIT OF CERTIORARI PLACED ON 4/29/08 DOCKET
43.	10-JUL-08	MEMO MOTION / TO ENFORCE MANDATE – DONNIE RAY VENTRIS
44.	17-JUL-08	ENTRY OF APPEARANCE / MAAG FOR STATE
45.	17-JUL-08	RESPONSE – / TO MTN TO ENFORCE MANDATE – STATE
46.	17-JUL-08	MEMO ORDER / NOTED – ENTRY OF APPEARANCE BY JARED MAAG.
47.	18-JUL-08	ENTRY OF APPEARANCE / MCALLISTER FOR STATE (CO-CNSL)
48.	18-JUL-08	MEMO ORDER / NOTED-ENTRY OF APPEARANCE BY STEPHEN MCALLISTER
49.	21-JUL-08	RESPONSE – / TO STATE'S RESPONSE TO MOTION TO ENFORCE MANDATE – DONNIE RAY VENTRIS
50.	01-OCT-08	STATUS REPORT / U.S. SUPREME CT GRANTED CERT-STATE

51.	02-OCT-08	MEMO MOTION / FOR EXPEDITED RULING ON MTN TO ENFORCE MANDATE – DONNIE RAY VENTRIS
52.	06-OCT-08	MEMO NOTATION / PETITION FOR WRIT OF CERT GRANTED BY U.S. SUPREME CT
53.	08-OCT-08	RESPONSE – / TO MOTION FOR EXPEDITED RULING / ENFORCE MANDATE – STATE
54.	09-OCT-08	MEMO ORDER / MOTION TO ENFORCE MANDATE IS DISMISSED FOR LACK OF JURISDICTION
55.	09-OCT-08	ORDER / NOTED – MOTION TO EXPEDITED RULING OF MANDATE, RESPONSE, REPLY & STATUS REPORT

[Dated March 7, 2005]

RELEVANT DOCKET ENTRIES BEFORE THE MONTGOMERY COUNTY DISTRICT COURT (INDEPENDENCE), CASE NO. 2004-CR-000024-I-FE

1.	1/16/2004	Complaint Affidavit Prosceutor of Record F. William Cullins Hearing Scheduled (Attorney Review (01/22/2004 09:00 am)
2.	1/20/2004	Warrant Filed; Arrested 1/16/04
3.	1/22/2004	Defendant: Ventris, Donnie Ray Attorney of Record David Clark Hearing Rescheduled (Other 02/12/2004 09:00 am) Select PH date Order Appointing Counsel; Appt David Clark /s/ Judge Dent
4.	1/27/2004	Entry of Appearance; /s/ David Clark Request for Record of Preliminary Examination Pursuant to KSA 22-2904; D Clark
5.	2/11/2004	Charge Amended to (21.3716 Aggravated burglary) Charge Amended to (21.3701.A.2.B2 Theft by deception u/$500 to $25,000)
6.	2/12/2004	Hearing result for Other held on 02/12/2004 09:00 am: Hearing Held

		Select PH date
		Hearing Scheduled (Preliminary 03/12/2004 09:00 am)
7.	2/20/2004	Subpoena Issued; Rhonda Theel, Billy Ventris, Keith Holt, Martha Denton Crt 3/12/04 @ 9:00 am
8.	2/24/2004	Subpoena Issued; PS Rhonda Theel 2/23/04
9.	3/1/2004	Subpoena Filed; Cert Receipt Billy Ventris signed 2/25/04
		Subpoena Issued; Eric K Mitchell, MD Crt 3/12/04 @ 9:00 am
10.	3/3/2004	Subpoena Filed; PS Helen Cargile 3/2/04
11.	3/10/2004	Subpoena Filed; PS Keith Holt, Marsha Denton 3/8/04
12.	3/12/2004	Hearing result for Preliminary held on 03/12/2004 09:00 am: Preliminary Hearing Held
		Hearing Scheduled (Arraignment 04/08/2004 08:45 am)
13.	4/8/2004	Hearing result for Arraignment held on 04/08/2004 08:45 am: Arraignment, plead not guilty
		Hearing Scheduled (Jury Trial 06/28/2004 09:30 am)
		Plea Entered (NG 21.3401 Murder in the first degree)
		Plea Entered (NG 21.3716

		Aggravated burglary)
		Plea Entered (NG 21.3716 Aggravated burglary)
		Plea Entered (NG 21.3701.A.2.B2 Theft by deception u/$500 to $25,000)
		Plea Entered (NG 21.3701 Theft; Misdemeanor)
		Hearing Scheduled (Motion 05/06/2004 11:00 am)
		Hearing Scheduled (Motion 06/17/2004 11:00 am)
14.	4/28/2004	Request for Transcript of Preliminary Hearings.
15.	4/30/2004	Motion to Allow Defendant Access to Reference Books and for Removal of Hand Restraints when Meeting with Defendant's Legal Team
16.	5/5/2004	Subpoena issued to CA for service on Helen Cargile
17.	5/5/2004	Subpoena issued to MGSO for service on Bill Halvorsen; Marsha Stark; Dwaine Stark; Billy Ventris; David Wright; Erik Mitchell; Martha Denton; Keith Holt; Rhonda Theel; Det Ron Rooks; Det Ron Wade & Det Robert Dierks
18.	5/6/2004	Hearing result for Motion held on 05/06/2004 11:00 am: Hearing Held
19.	5/7/2004	Subpoena filed – Det Robert Dierks

		p/s 5/5/04
		Subpoena filed – Det Ron Wade p/s 5/5/04
		Subpoena filed – Det Ron Rooks p/s 5/5/04
		Subpoena filed – Rhonda Theel p/s 5/5/04
		Subpoena filed – Martha Denton p/s 5/5/04
		Subpoena filed – Keith Holt p/s 5/5/04
		Order for Transcript of Preliminary Hearing /s/ Judge Dent
20.	5/11/2004	Subpoena filed – David Wright /certified mail 5/5/04
		Subpoena filed – Erik Mitchell/certified mail 5/5/04
		Subpoena filed – Bill Halvorsen/certified mail 5/5/04
21.	5/12/2004	Subpoena filed – Marsha Stark/certified mail 5/5/04
		Subpoena filed – Dwaine Stark/certified mail 5/5/04
22.	5/20/2004	Subpoena filed – Billy Ventris/certified mail 5/5/04
23.	5/24/2004	Subpoena filed – Helen Cargile p/s 5/14/04

24.	6/17/2004	Subpoena Issued; 4 blank subpoenas issued to C.A.
		Transcript of Preliminary Hearing held March 12, 2004 Cathy Bush, CSR
25.	6/22/2004	Hearing Rescheduled (Jury Trial 08/30/2004 09:30 AM) Jury Trial continued from 6-28-04
26.	6/23/2004	Affidavit for Material Witness Order Material Witness Order
		Material Witness Warrant issued to MGSO on Johnny Doser
		Motion for Continuance
		Subpoena Issued: Erik K Mitchell, MD; Bill Halvorsen; David C.Wright; Lance Antle Court – 8/31/04 @ 9/1/04 – 9:00 am
		Subpoena Issued; Keith Holt; Martha Denton; Rhonda Theel; Det Ron Rooks; Det Ron Wade; Det Robert W Dierks; Marsha Stark; Dwaine Stark; Billy Ventris Court 8/30/04, 8/31/04, 9/1/04, 9/2/04 @ 9:00 am
		Subpoena issued to CA atty for service on Helen Cargile
		Order of Continuance – 8/30/04.
27.	6/28/2004	Order for Discovery Pursuant to KSA

28.	6/30/2004	Subpoena Filed; PS Rhonda Theel, Det Dierks, Det Ron Rooks, Det Ron Wade 6/24/04
29.	7/6/2004	Subpoena filed – Erik Mitchell/ certified mail 6/29/04
		Subpoena filed – Lance Antle/ certified mail 6/29/04
		Subpoena filed – David Wright/ certified mail 6/29/04
30.	7/7/2004	Subpoena filed – Bill Halvorsen/ certified mail 6/29/04
31.	7/8/2004	Subpoena Filed; Cert Mailing for Dwaine Stark and Mary Stark signed 7/6/04
32.	7/9/2004	Subpoena Issued; Undersheriff Jay Long – returned to C.A. for service Crt 8/31/04 & 9/1/04
		Subpoena Issued to MGSO; Scott Ferris – KBI Crt 8/31/04 & 9/1/04 @ 9:00 am
33.	7/16/2004	Subpoena Filed; PS Keith Holt 7/13/04; FAX copy to Undersheriff Jay Long 7/15/04; PS Martha Denton 7/13/04
34.	7/20/2004	Subpoena filed – Billy Ventris/ certified mail 6/29/04
		Subpoena filed – Scott Perris/ certified mail 7/13/04
35.	7/26/2004	Charge Amended to (21.3427

		Aggravated robbery)
36.	7/27/2004	Subpoena Issued – Helen Cargile
		Motion to Compel Attendance of Witness From Another State
		Petition to Compel Attendance of Out-Of-State Witness
		Certificate Certificate of Clerk
37.	8/9/2004	Defendant's Motion to Exclude Evidence
		Defendant's Request for Jury Instructions
		Motion to Compel Preservation and Disclosure of Evidence
		Defendant's Second Motion for Discovery
		Defendant's First Motion for Discovery
		Defendant's First Motion in Limine
38.	8/10/2004	Defendant's Third Motion for Discovery
		Motion for Preparation of Defendant's Criminal History Record
39.	8/11/2004	State's Objection to Motion to Exclude Evidence;
		State's Objection to Requested Jury Instruction;
40.	8/16/2004	Order to Transport; /s/ Judge Dent MGSO to transport Johnny Doser on

		8/27/04 from Boulder County Jail to MGDOC. MGSO to provide return transportation on Sept 3, 2004 SO
41.	8/19/2004	Subpoena filed – Helen Cargile p/s 8/18/04
42.	8/24/2004	Subpoena issued to atty for service on ????
43.	8/25/2004	Order Granting Defendant's Motion to Compel Preservation and Disclosure of Evidence Order for Preparation of Criminal History Order Granting Defendant's Third Motion for Discovery Order Granting Defendant's First Motion in Limine Order Granting Defendant's Second Motion for Discovery Order Granting Defendant's First Motion for Discovery
44.	8/27/2004	Order to Transport. – issued to MGSO
45.	8/30/2004	Return on Material Witness Warrant on Johnny Doser
46.	8/31/2004	Order to Transport. – transport Billie Ventris to MGDOC
47.	9/1/2004	Dismissed by Judge (Dismissed by Judge 21.3701.A.2.B2 Theft by deception u/$500 to $25,000)

48.	9/2/2004	Jury Trial – Not Guilty (Jury Trial – Not Guilty 21.3401 Murder in the first degree)
		Jury Trial – Guilty, Original Charge (Jury Trial – Guilty, Original Charge 21.3427 Aggravated robbery)
		Jury Trial – Guilty, Original Charge (Jury Trial – Guilty, Original Charge 21.3716 Aggravated burglary)
		Jury Trial – Not Guilty (Jury Trial – Not Guilty 21.3701 Theft; Misdemeanor)
		Hearing result for Jury Trial held on 08/30/2004 09:30 am: Jury Trial – Guilty, Reduced Charge Jury Trial continued from 6-28-04
49.	9/3/2004	Case Status Change: disposed
		Hearing Scheduled (Sentencing 09/30/2004 09:00 am)
		Instructions to the Jury Given by the Honorable Rawley J. (Judd) Dent
		Ct#1 – Not Guilty Verdict
		Ct#2 – Guilty Verdict
		Ct#3 – Guilty Verdict
		Ct#5 – Not Guilty Verdict
50.	9/9/2004	Motion for Judgment of Acquittal; David Clark
51.	9/13/2004	Motion for New Trial
52.	9/21/2004	State Objection to Motion for

		Judgment of Aquittal
		State's Objection to Motion for New Trial
53.	9/23/2004	PSI Filed; /s/ Kim Walker SL3 A Presum Prison SL5 I
54.	9/28/2004	Motion for Imposition of Durational and Dispositional Departure Sentences; D Maslen
55.	9/30/2004	Hearing result for Sentencing held on 09/30/2004 09:00 am: Hearing Held
		Sentenced to Confinement (21.3427 Aggravated robbery) Confinement terms: Penitentiary determinate: 247 months
		Sentenced to Confinement (21.3716 Aggravated burglary) Confinement terms: Penitentiary determinate: 34 months
		Journal Entry of Judgment; /s/ Judge Dent
		Conv'd by Jury 9/2/04 and Sent'd 9/30/04 in Ct#2 – Agg Robbery SL3 to 247 mos prison. Postrelease supervision term of 36 mos. CC $152.00, Atty Fee, BAF $100.00, FPF $45.00. Sentence begins date of January 14, 2004. Total days of jail credit earned is 260 days. 15% good time credit. Sent'd in Ct#3 Agg Burglary SL5 to 34 mos prison.

		Consecutive to Ct#2. SO,SOC,KSC
		Transport Packet Issued to MGSO
56.	10/5/2004	Return on JE; Def transported to KDOC 10/4/04
		Notice of Appeal; /s/ David Clark
		Order Appointing State Appellate Defender; /s/ Judge Dent
		Defendant: Ventris, Donnie Ray Attorney of Record Appellate Defender
		Order Appointing Counsel; Appt Appellate Defender /s/ Judge Dent
57.	2/22/2005	Order for Transcript; to Cathy Bush /s/ Appellate Defender
58.	2/24/2005	Appellant's Request for Additions to the Appellate Record;
59.	3/7/2005	Docketing Notice 05-94002-A
60.	3/7/2005	Table of Contents – Volume Five

[Filed January 16, 2004]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
SITTING AT INDEPENDENCE

AFFIDAVIT AND APPLICATION FOR ARREST WARRANT

NO. 04 CR-24 I (C)

STATE OF KANSAS, COUNTY OF MONTGOMERY:

Dated January 15, 2004, at 1221 P.M.

Detective Robert W. Dierks of the Montgomery County Sheriff's Office, being duly sworn on oath, says that he has reason to believe as follows:

1. The following crime or crimes are being or have been committed:

- Felony Murder K.S.A. 21-3401
- Aggravated Burglary K.S.A. 21-3716
- Felony Theft K.S.A. 21-3701

2. The above-mentioned crime or crimes have been committed or are being committed by:

Donnie Ray Ventris D.O.B. *** 38yr SS# *** W/M 6'1 175 Brn hair Grn eyes lives at *** Dearing Kansas.

Rhonda L. Theel D.O.B. *** 37yr SS# *** W/F 5'5 135 Brn hair Blue eyes lives at *** Dearing Kansas.

3. This affidavit and application is based on the following facts:

- On January 7, 2004 at 9:30 a.m. Affiant was dispatched to the Ernest Hicks residence

located on County Road 3900 just south of County Road 3000 on the west side of the roadway on the report of a man injured.

- Affiant arrived at the Ernest Hicks residence and came in contact with a white female that was later identified by Affiant as Helen Cargile the live in girlfriend of Ernest Hicks.
- Helen told Affiant that he (referring to Ernest Hicks) was in the house with blood all over him. Helen did tell Affiant that Ernest was in the bathroom of the residence.
- Affiant found a white male Affiant later identified as Ernest Hicks laying on the bathroom floor in a pool of blood.
- Affiant looking at the body of Ernest Hicks could see injuries to his chest, back and head and believed the injuries had been caused by a firearm.
- The Montgomery County Corner was called to the Hicks residence and pronounced Ernest Hicks deceased and believed he had been deceased for approximately an hour.
- Affiant through the investigation learned that Ernest Hicks had last been observed alive between the times of 7:30 a.m. and 8:00 a.m. by Helen Cargile.
- Helen Cargile also told Affiant that when she had last observed Ernest Hicks his 2003 Chevy pickup truck was parked in the driveway at the residence.

- Helen Cargile told Affiant that she had tried to find Ernest Hicks cell phone to call for help but that it was missing from inside the residence.
- On January 7, 2004 Affiant had the 2003 Chevy pickup that belonged to Team Down Hole Inc. and assigned to Ernest Hicks entered into N.C.I.C.
- Affiant during the investigation learned that Ernest Hicks wallet with an unknown amount of cash was also missing from the residence.
- Law enforcement officers executed a search warrant at the scene of the homicide on January 8 and 9, 2004. The scene evidence included evidence of bloodshed in the kitchen and gunshots in the master bedroom and master bathroom. No firearms were found at the scene.
- Also left at the crime scene boot prints where located in the kitchen of the Ernest Hicks residence and a retaining pin for a paper towel dispenser had been taken out of the residence by person or persons unknown. This retaining pin was constructed of wood, was of approximate length of 8 inches and about 2 inches in diameter, based upon Affiant's information. The retaining pin has not been found.
- An autopsy of the victim's remains conducted on January 8, 2004 indicated that the victim

died of multiple gunshots to the heart and head. The autopsy also identified injuries to the victim's head which are consistent with having been inflicted by the missing paper towel dispenser retaining pin.

- Citizen witnesses told law enforcement officers that the victim's missing vehicle was observed in Dearing and Coffeyville, Kansas on January 7, 2004. Both these locations would be along the most direct route from the victim's residence to the location where the victim's pickup vehicle was later found in Nowata County, Oklahoma.
- On January 11, 2004 Affiant was contacted by the Nowata County Sheriff Department advising they had located the 2003 Chevy pickup truck belonging to Team Down Hole Inc. that had been entered in N.C.I.C. by Affiant.
- On January 11, 2004 Affiant was taken to the location of the 2003 Chevy pickup by Nowata County Sheriff Department which was located ½ mile south of County Road 18 on County Road 419 on the West side of the road way in a drive into a wooded area in Nowata County Oklahoma.
- Affiant confirmed by looking at the V.I.N. that the pickup truck was the pickup truck that had been taken by unknown person or persons on January 7, 2004 from the Ernest Hicks residence.

- Affiant assisted in processing the scene where the 2003 pickup had been located and observed footprints dried in the mud in front of the 2003 pickup truck.
- Law enforcement officers searched this truck on January 12, 2004. No firearms or cellular telephone was found. The victim's wallet was found in the truck, but there was no cash therein. The vehicle's keys were not found.
- On January 13, 2004 Affiant conducted a interview with Leah Speer of Coffeyville Kansas who had came to the Sheriff Department to report some concerns she had with her brother Donnie Ray Ventris of Dearing Kansas.
- Leah Speer told Affiant that she believes that Donnie is using illegal drugs and that he has been acting very strange.
- Leah Speer told Affiant that her brother Donnie Ventris lives in Dearing Kansas at the address of 116 Herkweck.
- Leah Speer told Affiant that her brother Donnie Ventris lives in the residence with his girlfriend Rhonda Theel and that she drives a blue passenger car.
- Leah Speer told Affiant that she had spoken with her other brother David Ventris who lives in Cushing Oklahoma.
- Leah Speer told Affiant that David Ventris had told her over the phone that Donnie Ventris had arrived at his residence on

January 8, 2004 and had told him he had just shot someone and that a gang was after him.

- Leah Speer told Affiant that her brother Donnie Ventris had just got out of prison about a year ago for armed robbery.
- Affiant completed an NCIC Criminal History check on Donnie Ventris and found that he has been arrested for the offenses of theft of a vehicle and armed robbery on February 9, 1987 in Lincoln County Oklahoma.
- Affiant conducted an offender lookup on the Internet and found that Donnie Ventris had been convicted on attempted armed robbery with a firearm and unauthorized use of a vehicle. Donnie was discharged from the Oklahoma Department of Corrections on November 1, 2002.
- On January 13, 2004 law enforcement officers involved in the investigation interviewed two citizen witnesses in Nowata County, Oklahoma, who described meeting a white male and a white female shortly after 2:00 p.m. on January 7, 2004 approximately 2 miles from the scene where the victim's pickup vehicle was later discovered. These witnesses, who are unrelated to the investigation or any known party in interest to the same, described the male to be about 6 feet in height, in his 30's of slender build and clean shaven. The female, who identified herself as Rhonda L. Branham, was described as 5' 3" in height with blonde, curly hair and

prominently blue eyes. This couple told the citizen witnesses that they had been walking since 9:30 a.m. that same morning and offered an irrational explanation for the reason for walking for that much time. The explanation, which included two different versions, said in one that they had been with another couple enroute to Vinita, Oklahoma when the other couple became intimate in the car and as a result, they left the car and started walking. The other version of the explanation stated that the other couple left them after a stop for conveniences. The couple made several telephone calls asking for a ride. In one of the calls, one of the citizen witnesses talked to an unknown male who was called by the female identifying herself as Branham, and this unknown male asked the citizen witness for directions from Dearing, Kansas. The female identifying herself as Branham told the citizen witnesses that she had called someone from Dearing, Kansas. This female also told the citizen witnesses that her work telephone number was *** (stating that the number was for Bank of America). The female displayed a large sum of cash, which included Twenty Dollar denominations, and was at least two inches thick when folded. At approximately 3:30 p.m. on January 7, 2004, an unknown white male approximately in his 20's and an unknown white female approximately in her 60's arrived in a slate blue older vehicle with

unknown Kansas License Plate and gave the couple a ride.

- On January 13, 2004 law enforcement officers checked the telephone number and found that it relates to service at 116 Hertweck in Dearing, Montgomery County, Kansas. Telephone service at the address and telephone is issued to Donnie R. Ventriss.
- On January 13, 2004 Affiant received a search warrant for the residence of 116 Hertweck and executed the search warrant.
- Officers located evidence in the search of the residence that supported the arrest of Donnie Ventris and Rhonda Theel for possession of controlled substances.
- On January 15, 2004 Affiant conducted an interview with Robert Keith Holt and Martha Kay Denton.
- Martha Denton told Affiant that she had made arrangements with Rhonda Theel to borrow some money about two days before the homicide had occurred on the 7, of January 2004.
- Martha told Affiant that she had received a phone call from Rhonda Theel early in the morning she believed the homicide had occurred.
- Martha told Affiant that Rhonda Theel had told her that she had the money to loan her and to meet her at the pump station on 10th street.

- Martha told Affiant that both her and Keith went to the area of the pump station and found both Rhonda Theel and Donnie Ventris.
- Martha told Affiant that Rhonda was standing on the right side of the road and that Donnie was sitting inside his pickup truck described as a green Chevy S-10.
- Martha told Affiant that she noticed that Rhonda had something wrapped in a scarf in her hands but could not tell what it was.
- Martha told Affiant that when her and Keith pulled up that Ronda told her to drive the green pickup to her house and both Rhonda and Donnie got into the blue passenger car that Keith was driving.
- Keith told Affiant that after Donnie and Rhonda got into the car that they went back to 10th street turning south.
- Keith told Affiant that both Donnie and Rhonda started looking at a double wide trailer house on the west side of 10th street that had a black Chevy extended cab pickup truck parked on the south side of the residence.
- Keith told Affiant that they drove past the doublewide trailer and turned around in the driveway just south of the double wide and went back to the double wide trailer and pulled into the driveway.
- Affiant from the directions and description that Keith was giving knows it to be the

doublewide trailer that the homicide had been commented in on January 7, 2004 involving Ernest Hicks.

- Keith told Affiant that he pulled into the driveway of the double wide and let both Donnie and Rhonda out of the car and was told that they would catch a ride with there friend and told him to go home.
- Keith told Affiant that Donnie went and stood by the black Chevy pickup and that Rhonda was walking up to the front door of the residence when he left in rout back home.
- Martha told Affiant she later received a phone call from Rhonda and was told that they needed a ride back home from a store in Childers Oklahoma and asked her to come pick her and Donnie up.
- Martha told Affiant that both her and Keith went to the store in Childers Oklahoma and picked both Rhonda and Donnie up and gave them a ride back to there house where Donnie's pickup was located.
- Martha told Affiant that Donnie and Rhonda left in the green Chevy pickup.
- Martha told Affiant that she learned about the homicide on the night of January 7, 2004 and went to the residence of Rhonda and Donnie in Dearing Kansas.
- Martha told Affiant that she asked Rhonda if she had killed the man in the trailer house.

- Martha told Affiant that Rhonda told her that she should not be asking questions that she could get a bullet in her head.

All the aforementioned events occurred in Montgomery County, Kansas.

WHEREFORE, the undersigned requests that an arrest warrant issue for the individual described herein, as provided by law.

/s/ [illegible]
Detective Robert Dierks
AFFIANT-APPLICANT

Subscribed and sworn to before me on the above date and time.

/s/ Teresa A. Rolls
Notary Public

TERESA A. ROLLS
Notary Public-State of Kansas
My Appt. Expires 02/05/2005

[Filed September 3, 2004]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS

SITTING AT INDEPENDENCE

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No. 04 CR 0241
DONNIE RAY VENTRIS	)	
Defendant.	)	

INSTRUCTIONS TO THE JURY GIVEN BY THE HONORALBE RAWLEY J. (JUDD) DENT, CHIEF JUDGE

APPELLATE COURT NO. 05-94002-A ***

RECORD-VOL. NO. THREE

EXHIBIT NO.

STATE OF KANSAS

vs.

DONNIE RAY VENTRIS

DISTRICT COURT NO. 04 CR-24 I

DISTRICT COURT JUDGE DO1

COUNTY MONTGOMERY-INDEPENDENCE

* * *

INSTRUCTION NO. 14

You should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.

PIK 52.18-A

INSTRUCTION NO. 15

An accomplice witness is one who testifies that she was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice.

PIK 3d § 52.18

* * *

[Filed September 13, 2004]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS

STATE OF KANSAS,	)	
Plaintiff,	)	
v.	)	Case No. 04 CR 24 I (C)
DONNIE RAY VENTRIS,	)	
Defendant.	)	

MOTION FOR NEW TRIAL

COMES NOW the defendant, by and through his attorneys, and hereby requests that the Court grant a new trial in this matter pursuant to K.S.A. § 22-3501(1). In support of his motion, the defendant states and alleges as follows:

1. This matter was tried to a jury commencing August 30, 2004

2. On September 2, 2004, the jury returned a verdict of guilty on the charges of Aggravated Robbery and Aggravated Burglary.

3. The interest of justice requires a new trial in the matter based upon the following:

A. On January 13, 2004, the defendant was arrested. Following his arrest, when law enforcement officers attempted to question the defendant, he invoked his right to counsel. On

January 16, 2004, the defendant was charged in case number 04 CR 24 I (C) with Felony Murder, Aggravated Robbery, Aggravated Burglary, Felony Theft and Misdemeanor Theft.

B. On or about January 14, 2004, Johnny Doser, then an inmate at the Montgomery County Jail, was solicited by the Montgomery County Attorney to be a cell mate of the defendant's following the defendant's arrest, and following the defendant's assertion of his right to counsel. Upon Doser's agreement to cooperate with police, he became an agent of the State.

C. Doser testified over the objection of the defendant during the State's rebuttal at trial to statements Doser alleged the defendant made to him while they were housed together regarding the defendant's alleged involvement in the robbery and shooting death of Ernest Hicks. While no precise date was established for this alleged conversation, Doser stated in a taped interview on January 21, 2004, that the defendant had shown him a copy of an arrest warrant for murder prior to the conversation taking place. The arrest warrant was issued in this case on January 16, 2004, the same date the original Complaint was filed. The defendant's Sixth Amendment right to counsel had therefore attached prior to the alleged conversation between the defendant and Doser taking place.

D. While the United States Supreme Court has allowed information that would ordinarily

violate exclusionary rules to be used for impeachment purposes, the Supreme Court has concluded that when the offering of such evidence amounts to a constitutional violation itself, the evidence may not be used for any purpose. See Massiah v. U.S., 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The defendant's Sixth Amendment right to counsel had attached in this case, and he did not waive this right prior to speaking with Doser. "[I]n the absence of a later waiver of the initially invoked right to counsel, any subsequent statement transgresses the core constitutional right to counsel, rather than a judicially created prophylactic rule for the protection of that right, and therefore should not be available to the prosecution for any purpose." U.S. v. Spencer, 955 F.2d 814, 820 (2d Cir. 1992).

E. Kansas case law is consistent in this regard:

> Testimony by a police informant of the defendant's incriminating statements made while in jail pending trial are not admissible if the information was obtained surreptitiously by prior arrangements between the police and the informant. Such testimony violates the defendant's Sixth Amendment right to counsel if a criminal prosecution has been commenced against the defendant.
>
> State v. Pennington, 276 Kan. 841, 845, 80 P.3d 44 (2003) (citing State v. McCorgary, 218 Kan. 358, 360, 543 P.2d 952 (1975)).

4. The defendant's right to counsel was violated when the State used Doser to impeach the defendant's testimony. The interest of justice therefore requires that the defendant be granted a new trial, during which trial the testimony of Doser should be excluded.

WHEREFORE, the defendant prays this Court's order granting a new trial in this matter, and for such other and further relief as the Court deems just and proper.

SOUTHEAST KANSAS
PUBLIC DEFENDER
OFFICE

By /s/ David A. Clark
DAVID A. CLARK, #14713
10 South Highland
Chanute, Kansas 66720
Telephone: (620) 431-3796
Telecopier: (620) 431-3918

ATTORNEY FOR
DEFENDANT

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above motion will be called up for hearing before the Honorable R. Judd Dent, District Court Judge, at the Judicial Center, Independence, Kansas, on the 30th day of September, 2004, at 11:00 o'clock a.m., or as soon thereafter as the matter may be heard.

/s/ David A. Clark

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed via first-class mail, postage prepaid, addressed to the following this 13th day of September, 2004:

F. William Cullins
Montgomery County Attorney
300 E. Main
Independence, KS 67301

/s/ David A. Clark

[Filed September 21, 2004]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS

SITTING AT INDEPENDENCE

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	No. 04 CR 024 I (C)
DONNIE RAY VENTRIS,	)	
Defendant.	)	

STATE'S OBJECTION TO MOTION FOR NEW TRIAL

COMES NOW, the State of Kansas, by and through the undersigned attorney and objects to the defendant's motion for new trial. In support thereof, the State alleges as follows:

STATEMENT OF FACTS

The State agrees with the defendant's statement of the facts. The State would like to emphasize that the testimony of Johnny Doser was not used in the State's case in chief and was used only to rebut the defendant's direct testimony during the trial.

ARGUEMENTS AND AUTHORITIES

The issue for the Court to address is whether the statement of a defendant obtained in violation of his sixth amendment rights can be used against him if

the defendant takes the stand and testifies inconsistent with the defendant's original statement. Kansas's cases have addressed this issue with reference the defendant's Fourth and Fifth Amendment rights.

In State v. Turner, 586 P.2d 279, 284, the Kansas Appellate Courts laid down the logical rules to follow when a defendant takes the stand to testify despite evidence of an otherwise inadmissible inconsistent statement. The Turner Court noted "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution did no more than utilize the traditional truth-testing devices of the adversary process."

In the Turner case, the prosecution was allowed to use for impeachment purposes an otherwise inadmissible statement. The Turner Court reasoned, the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

In the case at bar, the defendant's sixth amendment right to counsel may have been violated. However, to render the defendant's statement completely inadmissible would grant the defendant a license to commit perjury. If the prior inconsistent statement made by the defendant was not admissible

as rebuttal evidence, the defendant could testify without any repercussions.

In the case at bar, the State was not allowed to use the defendant's prior inconsistent statement to the informant in its case in chief. The inability to use this statement in the case in chief clearly will act as sufficient deterrence to misconduct in the future. On the other hand, allowing the State to use the statement of the informant to directly rebut the testimony of the defendant prevents giving the defendant a license to lie in his testimony. To balance the scales of justice in this case, the admissibility of the statement given to the informant is clearly required.

The theory that an otherwise inadmissible statement can be used for impeachment purposes is well founded in other Kansas cases. In State v. Kee, 6 P.3d 938, the court found "...the impeachment exception to the exclusionary rule permits the prosecution to introduce illegally obtained evidence to impeach the defendant's own testimony." In State v. Stoops, 603 P.2d, 221, the court found again that "...a defendant's statement or confession may be used for impeachment purposes when the defendant takes the stand even though the statement is not admissible in the State's case in chief."

The defendant quotes three cases in support of the position that the statement should be inadmissible because it violated the defendant's sixth amendment. The three cases the defendant quotes are clearly distinguishable from the case at bar. In all three of those cases, the statement obtained in violation of the

sixth amendment was used in the case in chief of the prosecution. In the case at bar, the evidence was used to directly rebut the statement of the defendant.

WHEREFORE, the State prays the defendant take nothing by the way of his motion.

Respectfully,
/s/ [illegible]
F. WILLIAM CULLINS
Montgomery County Attorney
S.Ct. # 16850

CERTIFICATE OF MAILING

I hereby certify that on the 21st day of September 2004, a true and correct copy of the above and foregoing was placed in the U.S. mail, postage prepaid and properly addressed to:

David A Clark
10 South Highland Avenue
Chanute, KS 66720

/s/ [illegible]
F. WILLIAM CULLINS
County Attorney

[Filed May 6, 2005]

CRIMINAL CASE

IN THE FOURTEENTH JUDICIAL DISTRICT

DISTRICT COURT, MONTGOMERY COUNTY, KANSAS

STATE OF KANSAS	)	
Plaintiff/Appellee,	)	Appellate Court No.
Vs.	)	05-94002-A
DONNIE RAY VENTRIS	)	District Court No. 04
Defendant/Appellant	)	CR-024 1

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[Filed June 17, 2004]

[1]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
14TH JUDICIAL DISTRICT
SITTING AT INDEPENDENCE

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No.
	)	04 CR-24 I (C)
DONNIE RAY VENTRIS,	)	04 CR-26 I (C)
Defendant.	)	04 CR-45 I (C)

TRANSCRIPT OF PRELIMINARY HEARING

PROCEEDINGS had in the above-entitled matter before the HONORABLE RAWLEY J. (JUDD) DENT, District Judge of the 14th Judicial District of the State of Kansas, on the 12th day of March, 2004, in Independence, Kansas.

APPEARANCES

For the Plaintiff: MR. F. WILLIAM CULLINS
County Attorney
Judicial Center
Independence, Kansas 67301

For the Defendant: MR. DAVID A. CLARK
Southeast Kansas Public
Defender Office
10 South Highland
Chanute KS 66720

CATHY D. BUSH
Certified Shorthand Reporter
300 E. Main Street, Suite 201
Independence, Kansas 67301

* * *

[83]

And where'd Justin go? All right. Okay. And we're going to call Justin Ledbetter, Your Honor. Just go up there.

THE COURT: All right.

JUSTIN LEDBETTER

called as a witness on behalf of the State of Kansas, having been first duly sworn to tell the truth, whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. CULLINS:

Q. Would you state your name, please?

A. Justin Ledbetter.

Q. And where are you employed at?

A. Department of Correction.

Q. And in what capacity?

A. Supervisor.

Q. Is that here in Montgomery County?

A. Yes, sir.

Q. And that's the jail downstairs?

A. Yes.

Q. Are you familiar with an inmate by the name of Donnie Ventris?

A. Yes, sir.

Q. Is he in the courtroom today?

[84]

A. Yes, sir.

Q. And is he seated there in the orange?

A. Yes, sir.

Q. Now, I'd like to direct your attention back to January 20th of 2004. Did you have an opportunity to conduct a search of a cell that the Defendant was in?

A. Yes.

MR. CLARK: What year?

MR. CULLINS: January 20th of 2004.

MR. CLARK: For the record, Judge, I have a copy of the Complaint and Information and this witness is not endorsed, nor have I received any report from him, so I guess on that basis I would object to his testimony.

MR. CULLINS: Judge, he is not on the Complaint. I would ask to endorse him, since this is the preliminary hearing, and I don't believe I have any written reports from him either.

THE COURT: All right. If you have any reports, turn them over to counsel. Over

counsel's objection, I'll allow the State to endorse the witness.

Q. (By Mr. Cullins) Mr. Ledbetter, have you prepared a report in reference to an incident that occurred

[85]

on January 20th of 2004?

A. Yes.

Q. Could you provide that to my office?

A. Sure.

Q. Okay. Now, um, back on January 20th of 2004 ---

MR. CLARK: Can we do that now, Judge? My cross-examination might be a little more effective if I knew what the report said before.

THE COURT: It doesn't look like it's very long. But do you need this to testify from?

A. No.

MR. CULLINS: Why don't we have Ron Rooks come up and I'll do the ---

THE COURT: Are you going to make a copy of it? Just go ahead and give it to him now.

MR. CULLINS: Can I go ahead and continue then?

MR. CLARK: Sure.

THE COURT: Uh-huh.

Q. (By Mr. Cullins:) Let's see. January 20th, 2004, you conducted a search of a -- of an inmate's cell in the jail downstairs; is that correct?

A. Yes, sir.

Q. And that cell was occupied by who?

A. Ventris and Dozier.

[86]

Q. Did you have any particular reason for conducting that search?

A. They told us to do a search in there, because he might have had some items hidden, and ---

Q. Who told you?

A. Julie McConnell, the shift supervisor.

Q. Indicated that who might have some items hidden?

A. Ventris would have some items.

MR. CLARK: I'm going to object, Your Honor.

MR. CULLINS: Just offering it to explain his conduct, Your Honor, and not for the truth of the matter asserted.

THE COURT: What's your objection?

MR. CLARK: My objection is, is basically they're trying to use this evidence to imply that whatever they found in the cell was my client's, so unless I know the basis of knowledge for the person who was saying we think Mr. Ventris had some stuff in there, I, obviously, can't confront this witness, because he doesn't -- I

mean, they searched the cell. I don't think it matters why. They certainly have the right to do that at any time.

THE COURT: I agree. Sustained.

[87]

Q. (By Mr. Cullins:) Now, you searched a cell occupied by Johnny Dozier and Mr. Ventris; is that correct?

A. Yes, sir.

Q. And you searched that cell on January 20th of 2004; is that correct?

A. Yes.

Q. Prior to searching the cell, were the inmates removed?

A. One was. Ventris was still in his room.

Q. Okay. Mr. Ventris was still in the jail cell?

A. Yes.

Q. Which inmate was removed?

A. Dozier.

Q. How long was he removed prior to the search?

A. Probably 30 minutes.

Q. And who was he removed by?

A. I can't recall.

Q. He was not removed by you?

A. No.

Q. Mr. Ventris remained behind in the jail cell, is that correct?

A. Yes, sir.

Q. And he was then removed prior to search; is that correct?

[88]

A. Yes.

Q. And you conducted the search?

A. In the room, yes.

Q. Okay, in the cell, itself?

A. Right.

Q. Did you find anything in your search that caused you some concern?

A. I found a metal object that was sharpened with a point.

Q. Okay. I'm going to have you look at what I'm going to ask the court reporter to mark as State's Exhibit 2.

(STATE'S EXHIBIT NO. 2 WAS MARKED FOR IDENTIFICATION.)

Q. (By Mr. Cullins:) If you'll look at State's Exhibit 2, do you recognize that item?

A. Yes, I do.

Q. And what is that item?

A. It's a metal plate. Comes off the intercoms in their rooms.

Q. And where was it found at?

A. Wrapped in a wash cloth behind the sink -- or behind the table.

Q. And the item is a bar with a point on it; is that correct?

[89]

A. Yes, sir.

Q. Now, are inmates allowed to keep items such as this in their possession?

A. No.

Q. It's against jail regulations?

A. Yes.

Q. Once you found this item, what, if anything, did you do with it?

A. I turned it over to McConnell, the supervisor of that shift. Then she turned it in to, I believe, Ron Rooks.

Q. And where, again, in the cell did you find this?

A. Behind the table and chair that they have in their room connected to the wall.

Q. Was it in plain view?

A. No.

Q. Exactly, where was it at?

A. About a quarter inch space shoved behind the table.

Q. Now, how long had Mr. Ventris been in that jail cell?

A. I can't recall.

MR. CULLINS: I don't have any further questions.

CROSS-EXAMINATION

BY MR. CLARK:

[90]

Q. What was the name of the other inmate in the cell?

A. Johnny Dozier.

Q. Are you any relation to Mr. Dozier?

A. No, not really. It's my dad's wife's son, which I haven't saw my dad in 14 years, so no.

Q. So there's no blood relationship there?

A. No.

Q. Technically, he'd be a step-brother?

A. Would be, but no.

Q. So this cell is occupied by Johnny Dozier and Donnie Ventris?

A. Yes.

Q. And how long had Johnny Dozier been in that cell?

A. I couldn't tell you.

Q. Were there people in that cell prior to either Johnny Dozier or Donnie Ventris being held in that cell?

A. Yes.

Q. And the item you found was not found in plain view; is that right?

A. No, sir.

MR. CLARK: I don't have any other questions, Your Honor.

THE COURT: Mr. Cullins?

MR. CULLINS: That's all the questions I

[91]

have, at this time, Judge.

THE COURT: Where was this item found?

THE WITNESS: It was behind their table and chair that's in their room. It's got just a little gap between that and the wall where you can put stuff in.

THE COURT: Thank you. You can step down and be excused. Call your next.

* * * *

[Filed May 6, 2005]

[1]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
14TH JUDICIAL DISTRICT
SITTING AT INDEPENDENCE

STATE OF KANSAS,	)	
Plaintiff,	)	
vs.	)	Case No.
	)	04 CR-24 I (C)
DONNIE RAY VENTRIS,	)	04 CR-26 I (C)
Defendant.	)	04 CR-45 I (C)

TRANSCRIPT OF JURY TRIAL

VOLUME II

PROCEEDINGS had in the above-entitled matter before the HONORABLE RAWLEY J. (JUDD) DENT, District Judge of the 14th Judicial District of the State of Kansas, on the 2nd day of September, 2004, in Independence, Kansas.

APPEARANCES

For the Plaintiff: MR. F. WILLIAM CULLINS
County Attorney
Judicial Center
Independence, Kansas 67301

For the Defendant: MR. DAVID CLARK
MR. JEB GRIEBAT
Southeast Kansas Public Defenders
10 South Highland
Chanute KS 66720

MR. DAVID MASLEN
Southeast Kansas Public
Defender
200 Arco Place, Suite 124-125
Independence, Kansas 67301

CATHY D. BUSH
Certified Shorthand Reporter
300 E. Main Street, Suite 201
Independence, Kansas 67301

* * *

[3]

(AT 9:34 A.M., THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE OF THE JURY, THE DEFENDANT BEING PRESENT.)

THE COURT: Okay. Thank you, Ladies and Gentlemen. We're back on the record in State of Kansas versus Ventris with the jury seated in the jury box. The State has rested. We've resolved some post-prosecution motions, and we're ready for the defense.

MR. MASLEN: Your Honor.

THE COURT: Oh, we already called two witnesses, so we're ready for the next witness.

MR. MASLEN: At this time, Your Honor, Donnie Ray Ventris will testify on his own behalf.

THE COURT: All right, Mr. Ventris, come on up.

DONNIE VENTRIS

called as a witness on his own behalf, having been first duly sworn to tell the truth, whole truth and nothing but the truth, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. MASLEN:

Q. Please state your name.

A. Donnie Ventris.

[4]

Q. Okay. You need to move a little bit closer to the microphone. You know, talk into the microphone. If I ask you something you don't understand, you might tell me I need to talk up or whatever, okay?

A. Okay.

Q. Were you living in Dearing, Kansas, at the end of the year 2003?

A. Yes.

Q. How long had you lived there?

A. A few months. Maybe four.

Q. Can you give me just a brief description about what that home was like?

A. Two bedroom, living room and kitchen, and a bathroom.

Q. Did you know Rhonda Theel?

A. Yes.

Q. About when did you meet her?

A. September, October. Somewhere around there.

Q. Of what year?

A. 2003.

Q. Do you recall how you met her?

A. Through my sister.

Q. At some point, she started living with you; is that correct?

A. Yes.

Q. Do you know about how long after you start -- you met

[5]

her that she started living with you?

A. I don't know that. We started dating, and it was about two weeks after we started dating.

Q. Okay. Now, did you live together at your home in Dearing?

A. Yes.

Q. Did Rhonda keep another house while she -- while you were living in Dearing?

A. Yes.

Q. Do you know where that was?

A. In Independence.

Q. Did she bring all of her possessions over to the house at Dearing?

A. Not that I know of.

Q. While Rhonda and you were living together, did you meet some of her friends and family?

A. Yes.

Q. Did you, at some time, meet Marty Denton?

A. Yes.

Q. Did you, at some time, meet Keith Holt?

A. Yes.

Q. What was the relationship of Marty Denton to Rhonda Theel?

A. She told me that they growed up together.

Q. Okay. And do you know what kind of relationship Rhonda

[6]

had with Keith Holt?

A. She just said she knew him through her, Marty.

Q. Okay. Rhonda knew ---

A. Keith Holt.

Q. Through?

A. Through Marty, because Marty was going with him.

Q. Do you recall about when or where you met Marty and Keith in relationship to when Rhonda started living with you?

A. Where I met them? I'm not for sure. It might have been their house or my house.

Q. Do you know when that was in relationship to when Rhonda moved in with you?

A. Oh, no.

Q. So what kind of relationship did you have with Marty and Keith?

A. I didn't. I just knew them through Rhonda.

Q. Did you ever go over to their house to visit or anything like that?

A. I went over there with Rhonda.

Q. How often did you do that?

A. I've been over to the house a few times.

Q. Do you recall when the last time you had any contact with either Marty or Keith before the morning of January 7th, 2004, would have been?

[7]

A. No.

Q. Did you know Kim Eytcheson?

A. Yes.

Q. How did you come to know Kim Eytcheson?

A. It was through Rhonda, too.

Q. So did you know Kim before you knew Rhonda?

A. No.

Q. Did you have any kind of special relationship with Kim beyond knowing Rhonda?

A. I've talked to her once without Rhonda's present -- without Rhonda being there, yes.

Q. Well, when you had those discussions with her, did you ever discuss ---

A. I just discussed one -- I just went over there one time. I discussed Rhonda with her.

Q. At that point, did you talk about either Helen Cargile or Ernest Hicks?

A. No.

Q. Were you ever around Kim Eytcheson when her and Rhonda were discussing either Helen Cargile or Ernest Hicks?

A. Yes.

Q. Do you recall about when that would be?

A. Well, there was a couple of times. What dates, I don't know the dates, but I know there was a couple of times. Once when I was over at Kim's house and once when Kim

[8]

had come over to my house.

Q. Did you get involved in any of the discussion that was going on about either Helen or Ernest Hicks?

A. No.

Q. What kind of information did you know about Ernest or Helen, based on those conversations that you were around?

A. Just what Rhonda told me.

Q. Okay, which would be what?

A. That Ernie Hicks was beating on the children.

Q. Okay. Did she ever give you any details about that?

A. Um, she told me that he was beating Chloe in the back of the head to make her go to sleep.

Q. Had you ever met Ernest Hicks?

A. No.

Q. Had you ever heard anything about him other than the allegations from Helen that he'd abused Chloe?

A. No.

Q. On the morning of January 7th, did you know where Ernest Hicks lived?

A. No.

Q. And had you discussed anything before going over there with Rhonda about Ernie besides the issue with the children?

A. No.

[9]

Q. Had you ever heard anything about -- from Rhonda or Kim about Ernest Hicks' money or his home or his possessions?

A. No.

Q. Now, the morning of January 7th, 2004, could you tell me what had been going on from the evening before until the topic of Ernie Hicks and the kids comes up?

A. Well, we was -- we was on dope. I was watching cartoons, and Rhonda was just jabbering at me.

Q. Was that a common thing for Rhonda to jabber?

A. Yes. She talked a lot.

Q. Was she talking about anything, in particular?

A. No. No, not really.

Q. Okay. And you said you were on dope. What drugs had been used that morning?

A. Methamphetamine.

Q. Did both you and Rhonda use methamphetamine that morning?

A. Yes.

Q. Do you know the last time before going over to Ernest Hicks that any drugs were used by either you or Rhonda?

A. It was that morning. It was still dark out. I know that. I don't know what time.

Q. Now, at some point in time, did the topic of Helen Cargile and her children come up?

[10]

A. Yes.

Q. Do you recall how that topic got raised?

A. Rhonda brought it up.

Q. Do you recall anything specific that she said?

A. She said that she wanted to speak to Ernie, or Mr. Hicks.

Q. Well, did she say what or why she wanted to talk to him about?

A. About the abuse.

Q. Did she tell you anything beyond that, about when she planned to do to talk to him?

A. No.

Q. Well, what was your response to her bringing up that topic?

A. I told her that it wasn't none of my business.

Q. Okay. Did -- did she continue to talk about the topic?

A. She talked about it for months.

Q. Okay. Well, that morning, did ---

A. That morning, yeah, she kept -- she kept on, yeah.

Q. Okay, was she continuing to jabber about that?

A. Yes.

Q. And how did you respond to that beyond telling her it was none of your business?

A. That was it.

[11]

Q. At some point in time, are there some phone calls made from your home?

A. Yes.

Q. Could you tell the jury what kind of phone services you had at your home in Dearing?

A. I had two -- two phones, but they was both wireless and one was in the living room and one was in the bedroom.

Q. Now, were the phone calls that morning incoming or outgoing?

A. Rhonda made the phone calls.

Q. Okay. How did you know that Rhonda had made the first phone call?

A. Because she done it in the bedroom.

Q. Okay.

A. Or she started in the bedroom, and then she went to the living room.

Q. Is that where you were?

A. Watching cartoons.

Q. Okay, so did she dial up the phone in the bedroom?

A. Yes.

Q. Did you know who she was calling, at that time?

A. No.

Q. Had she said anything to you about who she was calling or why?

[12]

A. No.

Q. Did she carry on any of the conversation with you in the bedroom?

A. No.

Q. At some point in time, did you get some kind of indication who she'd been talking to on that first phone call?

A. Yeah. I went into the kitchen to get me a glass of milk or water, or something. I don't know what I went in there to get. I went in there and got something and I heard her mention Kim's name over the phone.

Q. Okay, but did you hear any of her conversation?

A. I didn't hear the conversation, no.

Q. Was there -- did Rhonda place any more phone calls that morning?

A. Yes.

Q. How did you know about that?

A. I seen her.

Q. Okay. Did she dial up the numbers in front of you?

A. She dialed it right after she got off the phone with Kim while I was still in the kitchen. I don't know. She may have called Kim back. I don't know who she called, but I know she called somebody else.

Q. So you weren't privy to any of that phone call; is that right?

[13]

A. No.

Q. Was that, that you know of, two phone calls or were there any more?

A. All I know of is two.

Q. Now, was it after those phone calls that the decision to go over to Ernest Hicks' house was made?

A. That's when she come in and asked me if I'd go with her, yes.

Q. Do you recall how she asked you that?

A. She was just hyper.

Q. Okay. Was that chattering again?

A. Yes.

Q. Do you recall anything specific about what she said about going over to Ernest Hicks'?

A. I didn't really pay much attention to her when she was on methamphetamine, because like I said, she talked a whole lot.

Q. Okay. Was the decision made to go ahead and go over there?

A. Yes.

Q. How was that made?

A. I gave in.

Q. Okay. Did you -- did she say anything to you about what was going to happen when you went over there?

A. No. She just told me she wanted to talk to him.

[14]

Q. Did you do any kind of preparations for going over to Ernest Hicks' home?

A. Got dressed.

Q. Okay. How were you dressed before then?

A. My boxers.

Q. What kind of clothes did you put on?

A. Blue jeans, a turtle neck, flannel shirt and a jacket. And, well, I had some gloves and a hat.

Q. Okay. And did you have anything to keep you warm besides the hat and gloves?

A. Well, the jacket and flannel shirt.

Q. Can you describe that jacket?

A. Just a gray jacket. I don't really know.

Q. Okay. When Rhonda decided to head over to Ernest Hicks, how was she dressed?

A. In sweats.

Q. And did she change her clothes before going?

A. She put on some more clothes, yes.

Q. Do you recall what she was wearing when you left?

A. No. She got -- she put on a coat and some gloves and a scarf, and that was it, I guess, I think. I think she wore the sweats.

Q. Now, did you take anything with you when you headed out the door to go over to Mr. Hicks'?

A. No.

[15]

Q. Did you notice whether Rhonda had anything with her?

A. No.

Q. Did she have any kind of purse or anything like that?

A. Not that I saw.

Q. And before leaving, did you and Rhonda discuss, at all, what was going to happen when you got over there?

A. No.

Q. Did she tell you anything about what she intended to do besides talk to Ernest Hicks about the kids?

A. That was it.

Q. Did -- at any time, did the topic of Ernest Hicks' money or possessions come up before you leave to go over there on the morning of January 7th?

A. No.

Q. Well, why did you end up going over there with Rhonda that morning?

A. To shut her up, really.

Q. Did you have a gun with you when you left to go to Ernest Hicks' house?

A. No.

Q. Do you know whether Rhonda had a gun with her when she left to go to Ernest Hicks' house?

A. I didn't see one.

Q. When you left to go to Ernest Hicks' house, did you know that Rhonda had called Marty Denton?

[16]

A. No.

Q. Had she said anything to you about Marty or Keith meeting you near Ernest Hicks' house?

A. No.

Q. When you got in the truck, did you know if there was any gun or weapon in the truck?

A. No.

Q. I probably didn't ask that right. Did you know if there was a gun or a weapon in the truck?

A. I didn't look, but I don't believe that there was.

Q. Okay. Who drove?

A. I did.

Q. Why did you drive?

A. Because her car had a flat.

Q. Now, you were down in Dearing, at the time; is that correct?

A. Yes.

Q. So did you drive north up the county road?

A. I don't know what direction. I know she told me to head towards Independence. I don't know if it was north, south, I don't know.

Q. Did you know where Ernie Hicks left -- I'm sorry, lived when you left Dearing that morning?

A. No.

Q. So how did you get up to the area of Ernest Hicks'

[17]

house?

A. She told me just to head for Independence.

Q. Now, when you come up the road to where would be the turn into Ernest Hicks' home, what happened, at that point?

A. We was driving towards Independence and she pointed at the trailer and she said that's the house, so I slowed down and was going to pull in the driveway and she told me not to, that she wanted me to pull up -- turn off on a road so she could get some air.

Q. And what did you do in response to that?

A. I pulled up there and turned off on the road.

Q. Can you tell us about where that was that you pulled up to?

A. Just -- I don't -- a couple of blocks past his driveway there was a dirt road going I don't know which direction.

Q. Now, did you just pick a road to turn onto or did you get some kind of instructions where to turn?

A. She told me.

Q. Did she tell you where to stop on the dirt road?

A. On top of the hill.

Q. When you got up to the top of the hill and stopped, did Rhonda do anything to get some air?

A. No.

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Q. Did she stay in the truck?

A. Yes.

Q. Did you watch Ernest Hicks' home from there up on the hill?

A. I could see his home, yes.

Q. Did Rhonda say anything to you while you were at that first location about Helen Cargile, her vehicle or anything about Ernest Hicks' home?

A. She said she didn't -- she wanted the kids to -- wanted the kids to go to school, or something like that. She said something like that. She was just talking, you know.

Q. So she was talking about Helen Cargile's kids, at that time; is that correct?

A. Yes.

Q. Did she, at any time, tell you that she'd seen anything about what was going on down at the Hicks' residence?

A. (Shaking head).

Q. When you were at that first location, did you know that Marty and Keith were on their way to meet you there?

A. No.

Q. At some point in time, did you drive your truck to another location?

A. Yes, across the road.

Q. Now, why did you do that?

[19]

A. Because Rhonda asked me to.

Q. When Rhonda asked you to do that, did you know that Marty and Keith were either there or on the way?

A. No.

Q. At some point, did Marty and Keith show up at the second location?

A. Yes.

Q. What happened -- well, when Marty and Keith drove up, who was driving?

A. In my truck or in their---

Q. Bad question. Thank you. When Marty and Keith drove up, which one of them was driving their vehicle?

A. Keith, I think.

Q. Where were you and Rhonda, at that time?

A. We was already stopped on the dirt road, and she was outside the truck.

Q. Okay. When did she get out of the truck at this second location on the dirt road?

A. Pretty much when I got there.

Q. Did you have any discussions with her between the time you got to this new location and when Marty and Keith showed up?

A. No.

Q. Before Marty and Keith showed up, had she told you they were coming?

[20]

A. No.

Q. Okay. Can you just kind of tell me then what happens after Marty and Keith show up until you get into Keith's vehicle?

A. She was talking to Marty for not very long, and then she came over and opened my truck and told me that Marty needed to borrow my truck.

Q. Was that the first time you heard anything about Marty taking your truck?

A. Yes.

Q. And had you been outside of the truck before that point in time?

A. No.

Q. What did you do when Rhonda said Marty needs to borrow your truck?

A. I got out of the truck.

Q. Where did you go from there?

A. I got in the car with, oh, what's his name, Keith. Keith.

Q. What part of the car did you get in?

A. Back seat.

Q. Where was Marty when you got into the vehicle?

A. She was outside the car.

Q. Where was Rhonda?

A. Outside the car.

[21]

Q. Now, did you have any conversation with Marty at that location?

A. No.

Q. Did you hear anything of what Rhonda or Marty were saying to each other?

A. No.

Q. Did you have any conversation with Keith before he drives off?

A. No.

Q. Okay. At some point in time, does Rhonda get in the car?

A. Yes.

Q. At that point in time, where's your truck?

A. Marty was getting in it. It was still there.

Q. Were you where you could see your truck when it finally drove off?

A. Yes.

Q. Had Keith already started driving to a new location, at that point in time?

A. Yes.

Q. So, at that point, you and Rhonda and Keith are in Keith and Marty's vehicle; is that correct?

A. Yes.

Q. I think he said that was a Pontiac. Does that sound about right?

[22]

A. Uh-huh. It was a four-door blue car.

Q. Did anybody get any instructions on where Keith was to go from there?

A. Yeah. Rhonda told him to go down there and turn on 10th Street.

Q. And did he do that?

A. Yes.

Q. Did she say anything to him about where you were going or why?

A. Not that I know of. She just told him to drive up in that driveway.

Q. And did she point out to him where to turn?

A. Yes.

Q. Did you have any discussions with either Marty or -- I'm sorry, with either Keith or Rhonda while

you were driving from that location to Mr. Hicks' home?

A. No.

Q. When you got in the vehicle with Keith Holt, did you have a gun with you?

A. No.

Q. When you got in the vehicle with Keith Holt, did you know whether Rhonda had a gun?

A. No.

Q. When you -- can you just tell the jury what happens about getting out of the vehicle once you arrive at the

[23]

Ernest Hicks' residence?

A. When I got to -- we both got out of the car. Rhonda asked me to stand by the truck. There was a truck in the driveway. He pulled right up beside the truck, and when I got out, she told me to wait right here and then she leaned back in the car and she was talking to Keith for a minute, and then when she got -- shut the door, then she told me that I'll go knock on the door, to wait right here.

Q. Okay. Did you hear anything of what she was saying to Keith?

A. No.

Q. When she told you to go stand by the truck, what did you do?

A. I just waited by the truck.

Q. Okay. Did you have some kind of hat on, at the time?

A. Yes.

Q. Can you describe that?

A. Just a stocking cap.

Q. Did you -- where did you stand by the truck?

A. By the driver's door, maybe.

Q. Okay. What -- did Rhonda go up to the door?

A. Yes.

Q. Can you describe where she was at the door? Did you actually see her there?

[24]

A. Yes.

Q. Okay. Was she at the door before Keith started to drive off?

A. I'm not for sure. I wasn't looking at Keith. I was looking at her. I know he drove off pretty quick.

Q. Okay, can you tell me what you saw when Rhonda went up to the door?

A. I saw Mr. Hicks open the door.

Q. I'm sorry?

A. I saw Mr. Hicks open the door.

Q. Okay. Where was Rhonda when that happened?

A. In front of the door.

Q. You saw the picture of the guardrail?

A. Yes.

Q. Do you know where she was in relationship to the guardrail?

A. She -- the door opens out. She was just backed up far enough where the door would go right past her.

Q. Were you able to hear whether there was any conversation going on between Mr. Hicks and Rhonda, at that point in time?

A. I didn't hear it.

Q. At some point, then, do you approach the door?

A. Yes.

Q. How did that happen?

[25]

A. Rhonda just turned around and waved at me and told me to come on.

Q. Where was Mr. Hicks when Rhonda waved at you to say come on?

A. By the time I got up to the door, he was backed up a little bit and Rhonda was standing inside the door.

Q. Okay. There's a threshold there. Had she actually crossed the threshold into the utility area?

A. Yes.

Q. And could you see Mr. Hicks from where you were?

A. Yeah. I could see right over Rhonda.

Q. And what way was he facing, at that time?

A. Rhonda. Facing us.

Q. Okay. I need to have State's Exhibit 5 up. Okay, you can see that on the screen in front of you; is that correct, Donnie?

A. Yes.

Q. So could you point out approximately where you were when Rhonda told you to come on up?

A. Where they got this truck, that truck was over here closer to the trailer, and I was standing right by the driver's door ---

Q. Okay.

A. --- on the far side.

Q. So let's move that Toyota SUV over a little bit more.

[26]

We all understand that, so can you point out about where you were in relationship to the -- to what would have been Mr. Hicks' vehicle?

A. Excuse me?

Q. Well, can you show me, using the Toyota that's up there, about where you would have been if that would have been Mr. Hicks' vehicle?

A. If we moved the Toyota over against the building, I would have been between -- the truck was between me and the trailer.

Q. Okay. And can you just point out on that diagram about where you were in relationship to the truck?

A. Right here. Oh, up here?

THE COURT: Uh-huh.

A. The truck was about right here, and I was standing right here somewhere.

Q. (By Mr. Maslen:) Okay. Was that behind the cab or near where the cab meets the bed of the truck or something?

A. The front of the truck, yes.

Q. Where was Rhonda, at that point in time?

A. On the steps.

Q. And where was Mr. Hicks?

A. He was -- he just opened the door. He had backed up. When I went around the truck and went up to the steps,

[27]

he was -- I don't know, in between right here (pointing).

Q. Okay. When you got up to the steps, what happened, at that point in time?

A. He was, like I said, he was in that -- I don't know what you'd call it, hallway, pantry-way, whatever. He was there. Rhonda was right through the door, and when I got up there, I was -- she was blocking the door. I was standing right behind her and he said, "Come in and shut the door."

Q. Okay. That's what Mr. Hicks said?

A. Yes.

Q. So was Rhonda already through the doorway?

A. Yes.

Q. What did you do then when Mr. Hicks said, "Come on in and shut the door?"

A. Rhonda stepped forward, and I stepped in behind her and pulled the door to.

Q. At that point in time, had you heard any of the conversation, any conversation between Mr. Hicks and Rhonda?

A. Just what he said to me.

Q. Okay. Did you end up, any of you, moving out of that utility-way into the kitchen area?

A. Yes.

[28]

Q. How did that happen?

A. Well, he just walked -- he was walking into the living room. That's when I heard -- that's when the conversation had started between him and Rhonda. He was asking her what -- what was going on.

Q. Okay. Can you tell the jury what part of that conversation you remember?

A. What do you mean?

Q. Well, do you remember any of the specific words between Mr. Hicks and Rhonda, at that time?

A. Well, he asked her -- he just asked her what we wanted.

Q. Did she reply to that?

A. She said that we was here to speak about the children.

Q. Okay. Do you recall how any of that conversation went after that?

A. He told her that he didn't know what she was talking about, that his kids was somewhere else. I don't know where. He said some -- I'm not for sure where he said, but he don't have them, and she screamed at him and told him that we wasn't talking about his kids, we was talking about Helen's kids.

Q. Now, when she screamed at him, we're talking about Helen's kids, was that the first time you heard anything that indicated more than just conversation?

[29]

A. Yes.

Q. Where were you, at that point in time? If you could stand up and show us about on the diagram where people were, at that point in time.

A. Mr. Hicks was over here, Rhonda was in here, and I was standing, maybe, right in here right behind her, a little bit behind her off to the side (pointing).

Q. Now, would Mr. Hicks' view of you have been obstructed by Rhonda?

A. No.

Q. At that point in time, did you have any clue that there were any weapons that had been brought into the house?

A. No.

Q. Okay. How did Mr. Hicks respond to Rhonda screaming about Helen's kids being what she was there to talk about?

A. He got agitated.

Q. Okay. What did he do that indicated to you that he was agitated?

A. His voice was raised.

Q. Do you recall anything he said, at that point in time?

A. He called her a lying bitch.

Q. And in response to that, then what followed when he calls her a lying bitch?

A. She just starts screaming at him.

[30]

Q. Okay. Do you recall anything she was screaming at him?

A. No, not particularly.

Q. Okay. Was there any movement? Did anybody move around during that point when they were screaming at each other and he's ---

A. Oh, Ernie Hicks jerked at her. I thought he was going -- I thought he was going to grab her, so I rushed him and grabbed him. I grabbed him from -- he had his hands up and I grabbed him from behind and I slipped in behind him and we fell to the floor.

Q. Tell me again what it was that made you grab him.

A. He -- he acted like he was fixing to grab Rhonda.

Q. What happened when you grabbed him?

A. We fell to the floor.

Q. Now, up until that time, had you said anything to Mr. Hicks?

A. No.

Q. When you fell to the floor, can you tell me what was going on between you and Ernie, at that point in time?

A. We was wrestling.

Q. Were you trying to hurt him?

A. No.

Q. Was he doing anything to hurt you?

A. He was trying to get away.

Q. You know where Rhonda was, at that point in time?

[31]

A. No. I wasn't -- I was focused on what I was doing.

Q. Did you hear any -- was she still jabbering at that point in time?

A. I was focused on ---

Q. Okay, and what were you trying to do that you were focused on?

A. To make sure he didn't hurt me.

Q. Now, how long -- was this struggle with you guys standing up?

A. No. When I grabbed him, we fell to the floor.

Q. Okay. Did you end up in another room?

A. Yes. Well, I don't -- I don't ---

Q. You can get up and show us what, if you will, show us what you recall about what happened during this struggle with Mr. Hicks.

A. When we started wrestling, it was right in here, and I don't know how far. I don't know where we was at in here, but I know we started, basically, right there. I don't know where we ended up, or nothing like that, but we was wrestling, yeah.

Q. At some point in time, did Rhonda get involved in the struggle that was going on between you and Mr. Hicks?

A. Yes.

Q. Okay. How did she get involved?

A. She was trying to throw something in Mr. Hicks' face

[32]

and got it on me too.

Q. And do you know whether she got any of it in Mr. Hicks' face?

A. I don't know. I slapped it out of her hand.

Q. Do you recall what it was you slapped out of her hand?

A. It stunk, I know that. I don't know what it was.

Q. Okay. What was -- it was in some kind of a container, right?

A. Yes.

Q. What kind of container?

A. Just a bottle.

Q. Did you ever see that bottle again?

A. No.

Q. Did that, her throwing the stuff on you and Mr. Hicks, alter the struggle that was going on between you and Mr. Hicks?

A. No.

Q. Okay. So the strug -- did a struggle continue, at that point in time?

A. Yes.

Q. At some point in time, does Rhonda get involved in the struggle again?

A. Whenever I finally got -- well, I don't know about finally, but what I done was I put Mr. Hicks, I got him kind of in a headlock. I had the left arm and his neck

[33]

and I had him kind of -- I just had his neck and his arm, and it was sticking up like that.

Q. Okay, Donnie, were you standing up, at that point in time?

A. Yes.

Q. Okay. Do you know how you'd gotten up on your feet?

A. While we was wrestling.

Q. Okay, and where was Mr. Hicks? Was he lying down, standing up, or what?

A. He was on his knees.

Q. Could you stand up and show, again, the headlock thing?

A. Mr. Hicks was on his knee. I was standing over the top of him. Well, I was basically over his feet, like, because when I got up, I was on top of him, and I was -- his left arm was up, and I had his neck like that (demonstrating).

Q. Okay. His neck's in between your arm and your body; is that correct?

A. And his arm (indicating).

Q. So his arm is up, like, towards your face; is that correct?

A. His left arm was, yeah.

Q. What were you trying to do, at that point in time?

A. I was trying to calm him down is what I was screaming at him, just calm down and I'll let you go.

[34]

Q. Okay, now, did you end up letting him go?

A. Well, Rhonda come in and was beating him with a stick, and I let him go right then and grabbed the stick and pulled it out of her hand.

Q. Okay. Did you have him in a headlock when Rhonda started hitting him with a stick?

A. Yes.

Q. What part of -- what was she hitting with a stick when that's going on?

A. Excuse me?

Q. Where was she hitting him with the stick?

A. Around the head and shoulders. She hit me too.

Q. And where did she hit you?

A. In the shoulder and back of the head.

Q. What did you do in response to -- or Rhonda starting to whack you and Ernie with the stick?

A. That's when I let Ernie go. I pushed him and I reached up and I grabbed the stick and pulled it out of her hand and told her to quit.

Q. Okay. Can you show -- can you stand up and show us how you turned loose? I think you said turned loose, shoved Ernie and grabbed the stick. Can you show how that happened?

A. Like I said, he was on the floor. His feet was underneath my feet. Whenever I let him go, I just

[35]

pushed him down. Rhonda had the stick back with her left hand. She had her stick back and I reached up and I grabbed the stick and I pulled it out of her hand and I stepped back and I told her just to quit, and then I was focused on Mr. Hicks again.

Q. Why did you shove Ernie during that process?

A. Because I didn't want him getting up right then and there, because I had something else to do.

Q. Okay. And that something else to do was what?

A. Grab that stick out of Rhonda's hand.

Q. Do you know about where you were in the house, at that point in time?

A. Just where I said. I'm not for sure where we was at, at that time.

Q. Okay.

A. We were ---

Q. Can you go ahead and get up there and show the approximate area?

A. Somewhere in here (pointing).

Q. Now, which direction was Ernie facing when he's on his knees and you turn loose of him?

A. I'm not for sure.

Q. Okay. Was -- where was Rhonda standing in relationship to you when you grabbed the stick?

A. She was to my right.

[36]

Q. Okay. Would that have been to the top of the diagram or bottom of the diagram?

A. Like I said, I don't know exactly where I was at, but let's just say that we was right here. Ernie would be sitting right here. Rhonda would have been right here and I would have been right here, if that's where we was at. I'm not for sure where we was at.

Q. Okay. What happens, then, after you pulled the stick out of Rhonda's hand?

A. That's when I seen the gun.

Q. Okay. Where did you see the gun?

A. In Rhonda's hand.

Q. Now, do you know which hand she had it in?

A. Left hand.

Q. Was that the first time you'd seen a gun that day?

A. Yes.

Q. Did you recognize that gun?

A. Yes.

Q. Where had you seen that gun before?

A. It was Rhonda's.

Q. Now, up until that point, had anything been said about money by anybody in the house?

A. Right then, basically.

Q. Okay. And what was said, at that point?

A. Rhonda asked him for his wallet.

[37]

Q. Is that the first time money came up as a topic in that house?

A. Yes.

Q. Did Mr. Hicks respond to Rhonda asking him for a wallet?

A. He said it was in the bedroom.

Q. Now, where are you standing, at that point in time?

A. About two feet away from both of them.

Q. Okay. What did you do, what was your response when you saw the gun?

A. I asked her what the hell she was doing.

Q. Did she respond to that?

A. She told me to mind my own business.

Q. And did you do anything else because of the gun being pulled out by Rhonda?

A. No.

Q. Ernie says -- is it at that same sequence that Rhonda asks about the wallet?

A. Yes.

Q. And what does Ernie do after he tells her that the money or the wallet's in the bedroom?

A. She told him to get up.

Q. Did he do that?

A. Yes.

Q. Can you describe what Ernie did when he got up as

[38]

Rhonda told him to?

A. She told him to take it to the bedroom and get the wallet, and he walked into the bedroom. He went in first.

Q. Did you move, at all, during that period of time?

A. Yeah. I kept both of them a little ways away from me.

Q. Okay. And how did you do that?

A. Just kind of backed up around towards the -- whatever was sitting there. I'm not for sure, the couch, or the furniture.

Q. Could you get up and show us, because you're saying there, and we don't see where you're ---

A. Over here. About right in between this stuff right in here (pointing).

Q. Okay. When Ernie goes into the bedroom, can you describe what direction he's facing and what you observed of him as he goes into the bedroom?

A. He's facing Rhonda.

Q. Okay, is that facing out through the door in towards the living room area?

A. Yes.

Q. Where's Rhonda, at that point in time?

A. Standing at the door.

Q. Is she facing towards the bedroom door?

A. Yes.

[39]

Q. How far is she from Ernie, at that point in time?

A. Maybe, two arms lengths.

Q. Are you back, then, behind her towards those?

A. Yes.

Q. That furniture?

A. Yes.

Q. Did you do anything, at all, at that point in time?

A. No.

Q. Did you say anything, at all?

A. No.

Q. What happens when Ernie actually goes into the bedroom?

A. I don't know if he reached for the door or reached for the gun, but he reached for Rhonda, or that away. He reached towards her and she shot him.

Q. Okay. Were you looking in that direction when it happened?

A. Yes.

Q. What did you see, at that point in time?

A. I seen a hole go in his chest.

Q. What was your reaction to seeing a hole in Ernie's chest?

A. I told her, "What the hell did you do?"

Q. Did she respond at all?

A. She said, "I had to."

Q. Did she turn back to you when she said that?

[40]

A. Yes.

Q. Did you see what happened to Ernie at the moment that you see the hole in his chest?

A. He just went backwards. I don't know where he went or nothing like that. I know he went backwards.

Q. And what happened right after you see that and you say to Rhonda, "What did you do?"

A. I told her I was getting the hell out of there.

Q. Did she respond to that?

A. No.

Q. Did you see Ernie again after that?

A. No.

Q. Did you go and look in the bedroom or anything?

A. No.

Q. You told her you were getting out of the house; is that what you said?

A. Yes.

Q. And what, in fact, did you do, at that point in time?

A. I left.

Q. Did you see what Rhonda did after that?

A. No.

Q. Can you just get up there and show the jury how you left the house?

A. I left out the same door we came in. I just walked around here, came straight out the door.

[41]

Q. Do you know where Rhonda was when you took off?

A. She was still standing there when I left.

Q. Standing there, meaning where?

A. In front of this door.

Q. Bedroom door?

A. Yes.

Q. Did she still have the gun?

A. Yes.

Q. Did you take anything at all with you when you left the house?

A. No.

Q. Where did you -- did you just walk at a normal pace from the living room out the back door?

A. I was pretty much in a hurry.

Q. Did you ever go back in the house?

A. No.

Q. Did you hear anything more of what happened in the house after you headed out -- headed to go out the back door?

A. I heard two more shots.

Q. Do you know where you were when you heard those additional shots?

A. At the door. Maybe out the door.

Q. Okay. What did you do once you got out the door?

A. I was leaving. I was walking down the road.

[42]

Q. Okay. Were you still on the driveway up to Ernie's house ---

A. Yes.

Q. --- into Ernie's house? At some point in time, you come into contact with Rhonda again?

A. Yes.

Q. How did that happen?

A. She pulled up beside me in that truck.

Q. Was that the truck that had been parked out front -- out by the side door when you first came in?

A. Yes.

Q. What did you do when Rhonda pulled up beside you?

A. She told me to get in.

Q. Did you do that?

A. Yes.

Q. When you got in the truck, did you -- had you ever been in that truck before?

A. No.

Q. Had you looked in the truck before you went in the house?

A. Just casually.

Q. Did you recognize anything in the truck that you thought might have been taken out of the house?

A. No.

Q. Now, did Rhonda continue to drive?

[43]

A. Yes.

Q. Why did you get in the truck with her, at that point in time?

A. I thought she was going to take me to my truck.

Q. Did you end up -- now, let me go back a second. Did you know where your truck was, at that point in time?

A. I knew Marty was using it.

Q. Okay. So did you have any discussion with Rhonda about getting to your truck?

A. Yes.

Q. And can you tell us when that conversation started?

A. Pretty much when I got in the truck.

Q. Do you recall what you told her?

A. I told her, "Take me home. Get me to my truck."

Q. Okay. Now, where -- do Marty and Keith live someplace around Dearing?

A. Yes.

Q. So would you have to go back down south down the highway from Ernest's house to get to Marty and Keith's?

A. I don't know if it was south. I know when you left his driveway, you'd have to turn right.

Q. Okay. Is that the direction that Rhonda turned when she left Ernie's driveway?

A. She went to the dirt road that we was on and went --

[44]

no. That dirt road goes this way. It wasn't right. It was straight. She went straight.

Q. Okay. Did you talk to her, at that point in time, about where she was going?

A. Yeah.

Q. And what -- did she tell you anything?

A. She told me that the truck needed gas.

Q. Okay. So I take it from prior testimony you end up at a gas station; is that right?

A. Yes.

Q. Where was that?

A. In Coffeyville.

Q. Now, did you drive through Dearing on the way to Coffeyville?

A. No.

Q. Did you drive by Marty and Keith's on the way to Coffeyville?

A. No.

Q. Did you have any discussion with Rhonda about what you were going to do as you drive and get gas?

A. No.

Q. Did you have any discussion with her about what had happened in the house?

A. I was telling her that she messed up.

Q. You get to the gas station, and did you put gas in the

[45]

truck?

A. Yes.

Q. You know where the keys to the truck were while you were at the gas station?

A. I don't know.

Q. Did you go inside and pay for the gas?

A. Rhonda gave me money, yes.

Q. Where was Rhonda when you went inside?

A. On the telephone.

Q. Was there some reason that you didn't just leave or call somebody, at that point in time?

A. No.

Q. You end up getting back in the truck with Rhonda; is that correct?

A. Yes.

Q. Did she continue to drive?

A. Yes.

Q. Did you know where she was headed, at that point in time?

A. Like I said, I thought we was going back to my truck.

Q. Do you mean, by that, going back to Marty and Keith's?

A. Yeah. Marty and Keith didn't live but a few miles from there.

Q. And did Rhonda head in that direction?

A. No.

[46]

Q. Did you end up -- you ended up down in Oklahoma; is that right?

A. Yes.

Q. Did you drive pretty much straight to Oklahoma?

A. Yes.

Q. Did you have any arguments with Rhonda on the way down there?

A. Yes, sir.

Q. And what about?

A. About what she did. About I didn't want to be on that highway. And then I looked in the glove box, through the manual of the truck, and it said that the truck had On Star and I was cussing her trying to get the hell out of the truck.

Q. Did she ever stop to let you out?

A. When we got to where the truck was.

Q. Now, did you discuss with her on your way where she was headed?

A. No.

Q. Did she ever tell you anything about what she had planned or where she was headed?

A. No.

Q. When you got there, did you know where you were?

A. No.

Q. Was it a place you'd ever been before?

[47]

A. No.

Q. Had she told you or had you discussed with her how you were going to get home from where Ernie's truck ends up being parked?

A. No.

Q. When you got to where Ernie's truck was parked, what happened, at that point in time?

A. I got out of the truck.

Q. And what did Rhonda do?

A. She got out of the truck and started spraying it down.

Q. Okay. Do you know where -- where she got whatever she used to spray the truck down?

A. No.

Q. Did you do anything with any of the contents of the truck?

A. No.

Q. Now, you heard her testify, didn't you, that you went through the tool box?

A. Yes.

Q. Did you go through anything in the truck besides the glove box?

A. No.

Q. Did you take anything with you from the truck?

A. No.

Q. Up until that time, had you seen the wallet?

[48]

A. Yes.

Q. Okay. When did you first see the wallet?

A. When she gave me $10.00 to pay for gas.

Q. Do you recall where that wallet came from when she gave you the $10.00?

A. On the seat by the console right by her.

Q. Okay. She's in the driver's seat; is that correct?

A. Yes.

Q. There's a console between the driver's seat and the passenger's seat; is that right?

A. Yes.

Q. Now, can you describe how the wallet was placed in that area?

A. Just laying on the seat up against her leg.

Q. So it was actually on the driver's seat?

A. Yes.

Q. Now, did the wallet -- was the wallet still in the truck when you got down to Oklahoma and parked?

A. Yes.

Q. Do you know what happened to the wallet once you got down to Oklahoma and parked?

A. No.

Q. Was there a cell phone in the truck?

A. I didn't see a cell phone in the truck, no.

Q. Okay. Was the stick that Rhonda used on Ernie in the

[49]

truck?

A. Yes.

Q. You know where that was when you got in the truck?

A. On the floor.

Q. Which floor?

A. Just in the front seat.

Q. While you're driving around, did you see the gun?

A. No.

Q. Did you ever have it in your possession while you were in the truck?

A. No.

Q. Did -- did you ever have possession of the keys to the truck?

A. No.

Q. When you left, did you walk away from that truck?

A. Yes.

Q. Did you leave with Rhonda?

A. Yes.

Q. Did Rhonda take anything with her from the truck?

A. When we -- we went across the road and jumped over this fence, she throwed the telephone and the keys and the stick.

Q. Okay. Did she take an atlas out of the truck?

A. She might have.

Q. And did you see what happened to the wallet?

[50]

A. No.

Q. At some point in time, did she have the gun with her when the two of you leave the truck?

A. I didn't see it, at the time, no.

Q. At some point in time, do you remember seeing the gun?

A. Yes.

Q. Where were you, at that point?

A. We'd walked a little ways out in the woods, and the Cimarron River was right there and I told her to throw the gun in the river, and she said no.

Q. Did she tell you why she did not want to throw the gun in the river?

A. She just told me she was out in the woods and she wasn't getting rid of it.

Q. At some point in time, does she, in fact, dispose of the gun?

A. Yes.

Q. Where did that happen?

A. Well, she turned around and we walked the other way. We went back by the truck and we went down and run into the highway and we turned left, and as we was walking up the highway, there was a culvert there and she throwed the gun in that.

Q. Now, up until that point in time when she throws the gun in the culvert ---

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A. Yes.

Q. --- had you had that gun any time the morning of January 7th?

A. No.

Q. When you -- when she throws the gun in the culvert, did she throw anything else in there?

A. Not that I know.

Q. If you can recall, do you know if you had seen the store that you ended up going into, could you see it from where the gun was thrown in the culvert?

A. I'm not for sure.

Q. Can you tell us what happened when you walked into that store in Oklahoma?

A. Just went up and got a sandwich and some chips and a pop.

Q. Okay. You heard Mrs. Stark say that she was a little bit apprehensive, or scared when you came in. Did you do anything that you thought would have made her scared?

A. I -- well, no. I was polite to her, but I was probably tense, yeah. I was in -- I was in a bad way. I was probably putting off something, but no. I -- I was nice to her. I was polite. I didn't say nothing.

Q. I think you've heard -- can you describe what Rhonda

[52]

was like when she went into the store?

A. She was like -- just always talking.

Q. So it was just the same kind of yacking that had been going on all day?

A. Yes.

Q. Did you sit down someplace in the store?

A. Yes.

Q. Where was that?

A. Well, they had a deli. When you come in the store, they have a cash register by the door and then you go past that and they've got a deli-like deal right there and they've got another cash register, and right a little ways from there there's a booth that sits in front of that deli. As soon as I got my sandwich, I sat there in that booth and was facing the cash register.

Q. Can you point out some distance from where you are to, in the courtroom, about how far that booth was from the cash register?

A. From -- maybe from me to you.

Q. Okay. Did you ever get up from there?

A. Once I went to the bathroom.

Q. And when you did that, did you go right back down and sit down at the booth?

A. Yes.

[53]

Q. Now, you ordered a sandwich, and chips and stuff; is that right?

A. Yes.

Q. Did you eat all that?

A. Pretty much.

Q. Did Rhonda order anything?

A. Yes.

Q. Same kind of stuff, sandwich and chips?

A. Yes.

Q. Did she eat any of what she ordered?

A. She ate some of it.

Q. Did you talk to anybody about making the phone calls or stuff that was done in there, at all?

A. I talked to nobody.

Q. How did you find out that Marty and Keith were coming down there to pick you up?

A. Rhonda come and told me.

Q. Had you discussed that on the way from the truck to the store?

A. No.

Q. Marty and Keith, then, actually, show up after a while; is that correct?

A. Yes.

Q. Did one or both of them come into the store to get you?

A. Keith.

[54]

Q. Okay. Did you end up leaving with them?

A. No. Rhonda was still talking to that woman, so Marty come in.

Q. Did you stay in the store a little while after Marty and Keith got there?

A. Just not very long.

Q. Do you end up getting in the car with Marty and Keith; is that right?

A. Yes.

Q. Was it that same Pontiac 6000 or whatever that ---

A. The blue car.

Q. The same one you went over to Mr. Hicks' house in?

A. Yes.

Q. Where did you sit in that car?

A. Front seat.

Q. Who was driving?

A. Keith.

Q. And I take it, then, Marty and Rhonda were both in the back seat?

A. Yes.

Q. And did you discuss anything about what had happened between when Keith let you off and when they came and picked you up with Marty and Keith on your way back?

A. No.

Q. Did you hear Rhonda talk about any of that on the way

[55]

back?

A. No.

Q. You get back to -- where did you go from there?

A. To Keith and Marty's house.

Q. Okay. Was your truck at Keith and Marty's when you got there?

A. Yes.

Q. Did you hang out and talk a while before you left?

A. I didn't talk. Marty and Rhonda was talking.

Q. Okay. Were you with them while they were talking between when you get back to Marty and Keith's and when you leave?

A. Yes.

Q. When you -- well, was what had happened that day discussed, at all?

A. No.

Q. Did you end up, then, leaving from there in your truck?

A. Yes.

Q. Did Rhonda leave with you?

A. Yes.

Q. Where did you go from there?

A. To my house.

Q. Rhonda indicated that she went back down to the truck in Oklahoma. Did you discuss that with her?

A. No.

[56]

Q. Did she tell you that she was going to go back down there?

A. Yes.

Q. Did she tell you what she intended to do when she -- or why she was going back down there?

A. Yes.

Q. And what did she tell you?

A. She said she was going to burn it.

Q. And did you respond to that in any way?

A. I told her I wasn't going nowhere near the damn thing.

Q. Now, did you leave Dearing for a while?

A. Yes.

Q. Where did you go?

A. To my brother's house.

Q. And is that in Oklahoma?

A. Yes.

Q. And did you come back to Dearing?

A. When I got down to my brother's house, he told me that -- he asked me -- he didn't tell me, he asked me where my brother was, and I told him I didn't know what the hell he was talking about, and he said, "Well, you was supposed to pick Billy up from Bartlesville. He just got out of jail," and I told him, "I ain't never heard that."

Q. Okay, you're talking about one brother, whose name is

[57]

what?

A. Billy Ventris, the guy that was up here.

Q. But the other brother?

A. David.

Q. David, so -- and that's David, Junior; is that right?

A. Yes. He's the oldest boy.

Q. Well, speaking of Billy, did you have some -- you heard him testify about the Crypts and the Bloods and shooting somebody; is that right?

A. Yes.

Q. Do you recall having a conversation with him that would have addressed what he was talking about that day, or yesterday?

A. Yes.

Q. When did that conversation occur?

A. In December.

Q. December before this January 7th?

A. Yes.

Q. And what was the nature of that conversation?

A. Like he said, that there was a black guy, he was in his early 20s, or something like that, and he was, basically, almost pimping my children.

Q. Okay.

A. My two twin daughters.

Q. I'm sorry, two daughters?

[58]

A. Yes, twins.

Q. What are their names?

A. ***

Q. How old are they?

A. 16.

Q. And where were they living, at the time?

A. With me.

Q. In Dearing?

A. Yes.

Q. And what were you concerned about?

A. His treatment towards them.

Q. And did you make some kind of comments about that man and how he was treating your daughters?

A. Yes.

Q. And do you recall what it was?

A. I told my brother that I was going to hurt that man if he didn't leave my children alone.

Q. Now, did you do something to address that issue instead of hurting that man?

A. Excuse me?

Q. Did you do something to address that issue instead of hurting that man?

A. What do you mean?

Q. Well, did you do something to end that problem?

A. I sent my children back to Oregon with their mother.

[59]

Q. Okay, and did you ever hurt that man?

A. No.

Q. Okay. When you went to Ernest Hicks', what was your intention?

A. I had no intention.

Q. Okay. Well, then, why did you go over there?

A. Because Rhonda asked me to.

Q. Did she tell you what she was going over there for, beyond talking to Mr. Hicks about the girls?

A. No.

Q. When is the very first time that you knew a gun was involved in what happened over there?

A. When I grabbed the stick out of Rhonda's hand.

Q. Did you do anything to try to stop Rhonda after she produces the gun?

A. No.

Q. Did you go to Ernest Hicks' house with the intent to rob Ernest Hicks or to help Rhonda rob Ernest Hicks?

A. No.

Q. When you started struggling with Ernest Hicks on the floor in his house, did you intend to hurt him?

A. No.

Q. Did you do anything to hurt him during that struggle?

A. No.

MR. MASLEN: I don't have any other

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questions, Your Honor.

THE COURT: All right, Ladies and Gentlemen, why don't we take our morning break, and then we'll have Mr. Cullins cross-examine Mr. Ventris.

Remember not to discuss the case among yourselves or with anyone else, or form an opinion about what you've heard, and we'll see you in just a few minutes. We'll be in recess.

MR. CULLINS: Did you say 15 minutes, Judge?

THE COURT: Yeah.

(THEREUPON, AT 10:41 A.M., A RECESS WAS TAKEN; WHEREUPON, AT 11:15 A.M., THE FOLLOWING PROCEEDINGS WERE HAD IN THE PRESENCE OF THE JURY, THE DEFENDANT BEING PRESENT.)

THE COURT: Okay. All right. Mr. Cullins.

CROSS-EXAMINATION

BY MR. CULLINS:

Q. Mr. Ventris, if I ask a question you don't understand, just ask me to rephrase it, okay?

A. Okay.

Q. And I have a hard time hearing, so if you'll talk loud.

A. Okay.

Q. And let's see. If you don't understand, ask me to rephrase it, or if you need me to repeat a question, just go ahead and tell me, okay?

[61]

A. Okay.

Q. This is the first time we've chatted; is that correct?

A. Yes.

Q. For example, the first question, how tall are you?

A. 6'1", 6' 2".

Q. Okay, and how much do you weigh?

A. About 200 pounds.

Q. Now, if I understand correctly, the morning of January 7th, you were at your house in Dearing; is that correct?

A. Yes.

Q. And Rhonda was with you; is that correct?

A. Yes.

Q. And you were using meth and smoking marijuana; is that correct?

A. Yes.

Q. How much methamphetamine had you been using?

A. A quarter paper. A quarter paper.

Q. I don't know what a quarter paper is.

A. Uh, hum, I don't know how to describe it.

Q. Is that what you would normally use ---

A. Yes.

Q. --- to get high? How much marijuana were you using?

A. I would just smoke a joint every once in a while. Smoke a joint every once in a while.

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Q. In relation to when you left for Ernest Hicks' house, when was the last time you used methamphetamine?

A. Like I said, it was dark that morning, but I don't know exactly when.

Q. Was the last time you used it?

A. Yes.

Q. What about marijuana?

A. I didn't smoke none then, no.

Q. Now, Rhonda indicated that she hadn't slept for days, because of the meth. Is that the same circumstance with you?

A. Yes.

Q. You hadn't slept for days?

A. Yes.

Q. Now, Donnie, if you don't -- how do you -- how do you do it, how do you recall everything so clearly that day when you're using meth and you had been up for days?

A. I haven't recalled everything clearly that day.

Q. It sounded to me when you testified that you didn't miss a beat.

MR. MASLEN: I'm going to object, Your Honor. It's argumentative.

MR. CULLINS: I'll withdraw the question.

THE COURT: Please.

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Q. (By Mr. Cullins:) Now, if I understand correctly, Rhonda had talked about going to Ernest Hicks' house for a month; is that correct, Mr. Ventris?

A. Something like that.

Q. And she had talked to you about it, as well as Kim Eytcheson; is that correct?

A. Yes.

Q. And it was upsetting her what she believed Mr. Hicks' relationship with his own children to be; is that correct?

A. With Helen's children.

Q. With Helen's children; is that correct?

A. Yes.

Q. It was clearly upsetting her and you could even see that yourself?

A. She kept talking about it.

Q. Okay. And she'd been talking about it for?

A. A while.

Q. A while, and you had advised her that it was none of her business; is that correct?

A. No. I advised her it was none of my business.

Q. Okay. That it was none of your business?

A. Yes.

Q. Okay. But you weren't concerned about whether or not it was her business; is that correct?

[64]

A. I don't try to tell people what they can talk about and what they can't talk about.

Q. So you didn't try to tell Rhonda what she could talk about or couldn't talk about?

A. No.

Q. You just told her point blank it's none of my business; is that correct?

A. Yes.

Q. Now, the morning of January 7th, as I understand it, you got in the car. It was your truck and you were going to Mr. Hicks' house; is that correct?

A. Yes.

Q. Because Rhonda wanted to talk to him about how he was treating the children; is that correct?

A. Yes.

Q. Why did you go?

A. Because she asked me to.

Q. But you just told me a second ago that it was none of your business.

A. She is my business.

Q. So Rhonda is your business?

A. Rhonda is my business.

Q. So you went, because Rhonda went?

A. I went, because Rhonda asked me to go.

Q. You didn't go because of the children; is that correct?

[65]

A. No.

Q. In fact, you considered that none of your business; is that correct?

A. Yes.

Q. Now, you did drive Rhonda to a hill; is that correct?

A. Yes.

Q. And I think, as you understand it, she indicated that she needed to get some air; is that correct?

A. Yes.

Q. And she got out and then you were looking at Mr. Hicks' house; is that correct?

A. No.

Q. What happened next, then?

A. We was both in the truck. When she got out is when we crossed the road and went to the other side. That's when she got out.

Q. Did you go up 10th Street?

A. 10th Street. I went from ---

Q. The paved road that goes north out of Dearing towards Independence?

A. Yes.

Q. That's -- I call it 10th Street. I think that's what most people call it. That's 10th Street, okay?

A. Okay.

Q. And then you did park -- so is that the road you went

[66]

on?

A. Yes.

Q. Okay. And the first place you stopped was where, as you recall?

A. We went right past this house and turned right on a dirt road, and was basically up on a hill.

Q. And then you turned -- and that's where she got out to get some air; is that correct?

A. No.

Q. Okay. Where did she get out at?

A. Across the road.

Q. When you were meeting Marty and Keith?

A. Yes.

Q. Okay. So you clearly remember that she didn't get out of the car then, she got out of the car across the road; is that correct?

A. Yes.

Q. Now, did you get out of the car the first time?

A. No.

Q. When I say the first time, I'm talking about when you were looking at Mr. Hicks' house?

A. No.

Q. You did not?

A. No.

Q. Did Rhonda?

[67]

A. No.

Q. Now, how did you know that you were looking at Mr. Hicks' house?

A. She told me.

Q. Rhonda told you?

A. Yes.

Q. At what point in time did she tell you?

A. She told me right before we passed his house, she pointed up there and said that was Mr. Hicks' house.

Q. She said that's where it's at?

A. Yes.

Q. Now, you knew that Rhonda was going to that house to confront Mr. Hicks about how he was treating -- how he was allegedly treating Helen's children; is that correct?

A. He was going -- she was going to talk to him, yes.

Q. About abuse; is that correct?

A. Yes.

Q. Abuse that he allegedly perpetrated; is that correct?

A. Yes.

Q. And you went to the house, not because of the children, but because Rhonda was your business; is that correct?

A. Because Rhonda was my girlfriend, yes.

Q. Well, I think earlier you said that Rhonda was your business?

[68]

A. When you have a girlfriend, is she not your business?

Q. I think that's a fair statement that she is.

A. Okay.

Q. Now, you also indicated that Mr. Hicks got hostile when he was confronted about his children; is that correct -- or not about his children, but about how he was allegedly treating Helen's children; is that correct?

A. I said he got loud.

Q. Well, I think you actually used the words hostile, like a normal person would. Do you recall that?

A. Maybe.

Q. So it's fair to say that a person gets upset whenever they are accused of doing something to children; would you agree with that?

A. Yes.

Q. Okay. I mean, you were upset when somebody allegedly was doing something to your daughters; is that correct?

A. Yes.

Q. Okay. Now, you knew that was a possibility going to Ernest Hicks' house; is that correct?

A. Knew that he would -- yes.

Q. There was a possibility he might get upset?

A. Yes.

Q. That didn't cause you to take a gun with you, did it?

A. No.

[69]

Q. Okay. How come?

A. How come I didn't take a gun?

Q. Uh-huh.

A. I never took a gun.

Q. But you knew there was a potential for conflict, correct?

A. Yes.

Q. And you knew that your girlfriend, the person you cared about, was going to confront him; is that correct?

A. I knew she was going to talk to him, yes.

Q. You didn't want to try to protect her?

A. I was there to help her, yes.

Q. Now, if I understand correctly, you're saying that when you got out of Keith Holt's vehicle, you went behind Mr. Hicks' truck; is that correct?

A. No.

Q. Okay. Correct me.

A. The truck was, like I said, it was parked right here (indicating). Keith pulled right up beside it when I got out of his car (indicating).

MR. CULLINS: Well, maybe I do need this on, Judge. I apologize.

THE COURT: Okay.

Q. (By Mr. Cullins:) I'm going to slide this over. If we say that this is roughly Mr. -- if we say this is

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Mr. Hicks' vehicle, acknowledging that that's probably a little bit further away from the steps than it actually was; is that correct, Mr. Ventris?

A. No. That would be Mr. Hicks' -- Mr. Keith -- or Keith's vehicle. That's where Keith was parked.

Q. Well, why don't you stand up and point to me where Ernie's truck was.

A. His truck was right here. Keith would have parked about right here (pointing).

Q. Now, was it parked the exact same way as that SUV is? I mean, it was facing to the west?

A. It was facing, yes.

Q. Now, if we pretend, because we know that that truck is in the right relationship to the steps Mr.

Hicks' vehicle would be, where did you stand beside that truck?

A. Whenever I got out of the car, I was standing right about here (pointing).

Q. Show me in relation to the -- to that Toyota where it says Toyota SUV. I understand that's not Mr. Hicks' truck, but it's in a square just like a truck would be, roughly, so if you could point to me where you were standing at.

A. If this truck was over here ---

Q. Uh-huh.

[71]

A. --- I would have been standing about right here. Right at the front door (pointing).

Q. Right at the driver's side door of the truck; is that correct?

A. Yes.

Q. And then you let Rhonda walk up to the steps by herself?

A. Yes.

Q. Okay. And you knew that Rhonda was going to confront Ernie about how he treated the children allegedly; is that correct?

A. Yes.

Q. And you knew that there was a potential that he could get hostile about that, correct?

A. From what they said.

Q. Okay, and you cared about Rhonda, right?

A. Yes.

Q. And you want the jury to believe that you didn't walk up to the door with her?

A. I want the jury to say that, no, I didn't walk up to the door. She asked me to wait by the truck.

Q. Is that when you put on the ski mask?

A. I didn't put on a ski mask.

Q. Is that the point in time when you decided to go ahead and rob Ernie?

[72]

A. I never decided to rob Ernie. I never wanted to rob Ernie.

Q. Now, as I understand it, you got inside the house; is that correct? Rhonda eventually said, "Come on in;" is that correct?

A. No. Mr. Hicks said, "Come in and shut the door."

Q. Who said that?

A. Mr. Hicks. Yeah, Mr. Hicks.

Q. Okay. So, apparently, you had moved from the truck to the steps; is that correct?

A. Yes.

Q. And when Mr. Hicks said that, was Rhonda already inside the house?

A. Standing at the door, yes.

Q. Okay. And so you said -- and you had approached her and you were standing beside her, at that point in time; is that correct?

A. Behind her.

Q. Behind her?

A. Yes.

Q. Okay. And then he said, "Come on in?"

A. Yeah. He said, "Come in and shut the door."

Q. Okay. And you had never met Mr. Hicks before; is that correct?

A. Yes.

[73]

Q. Do you know if Rhonda had met Mr. Hicks before?

A. She said she hadn't.

Q. Now, inside the kitchen, I guess, at some point in time, there is a struggle; is that correct?

A. Yes.

Q. And that is the first struggle, as I understand it, that occurred in the kitchen; is that correct?

A. Yes

Q. Yes?

A. (Nodding head affirmatively.)

Q. And you were struggling with Mr. Hicks; is that correct?

A. Yes.

Q. And, as I understand it, Rhonda, I guess, gets concerned about the fact that you're struggling with Mr. Hicks, so she decides to douse him with cleaner; is that correct?

A. She doused us both.

Q. Doused both of you with cleaner; is that correct?

A. Both him and me.

Q. But you also allege that Rhonda had a gun; is that correct?

A. What do you mean?

Q. Well, later on, you indicate that Rhonda pulled out a weapon, a gun; is that correct?

[74]

A. Yes.

Q. Now, at that point in time, instead of bothering to douse you guys with cleaner, wouldn't it have made more sense for Rhonda to pull out the gun and go, now, now, boys, cut it out?

MR. MASLEN: I'm going to object. Calls for speculation, Your Honor.

THE COURT: Sustained.

Q. (By Mr. Cullins:) You would acknowledge that Rhonda, as you would say, had more lethal force available than just a bottle of cleaner, wouldn't you?

A. Yes.

Q. Now, as I understand it, there's some sort of second struggle; is that correct?

A. No.

Q. No? Okay. When did Mr. Hicks allegedly get hit by Rhonda with the stick?

A. While we were still struggling.

Q. Okay. So that occurred also in the kitchen; is that correct?

A. No.

Q. Okay. Where did it occur at?

A. Like I said, I don't know. It was somewhere in between there. We was rolling on the floor.

Q. Okay. So you rolled around with Mr. Hicks; is that

[75]

correct?

A. Yes. Wrestling with him.

Q. Did you knock anything over?

A. I don't know.

Q. Well, from the photographs, it doesn't look like you knocked anything over. Would you agree with that?

A. Yes.

Q. Now, so the cleaner didn't work, I guess; is that correct?

A. Yes.

Q. So you're rolling around on the floor with him and then Rhonda gets a stick; is that correct?

A. Yes.

Q. And she starts hitting who with it?

A. Mr. Hicks.

Q. She didn't hit you with it?

A. Yes.

Q. Yes, she did?

A. Yes.

Q. Okay. So what's Rhonda's saying, at that point in time?

A. She's calling him a fucking liar.

Q. Okay. Did she say anything to you?

A. No.

Q. So Rhonda appears upset; is that correct?

[76]

A. Yes.

Q. And she's pretty mad at Mr. Hicks and calling him a liar; is that correct?

A. Yes.

Q. Again, you would agree, at that point in time, Rhonda would have had more lethal force available to her if she actually did have a gun, wouldn't you, Mr. Hicks -- or, Mr. Ventris? I apologize.

A. Yes.

Q. But you want the jury to believe that for some reason she chose to beat him with a stick; is that correct?

A. I'm not asking them to believe nothing.

Q. Okay. Now, if I understand correctly, at some point in time, you took the stick away from Rhonda; is that correct?

A. Yes.

Q. And then it was shortly after that that she pulled out the gun; is that correct?

A. Yes.

Q. And you do acknowledge that that was her .38; is that correct?

A. Yes.

Q. And you have used that gun in the past; is that correct?

A. No.

[77]

Q. It's not correct?

A. No.

Q. Now, you would acknowledge that the gun was actually kept at your house; is that correct?

A. Yes.

Q. And it was kept under your main master bedroom; is that correct?

A. Under our bed, yes.

Q. Okay. You knew where it was at, right?

A. Yes.

Q. Had you ever touched it before?

A. Yes.

Q. Okay. So you had used it before then?

A. No. I haven't used it. I've touched it.

Q. Why -- what, were you just looking at it, were you target practicing? What were you doing with it?

A. When I was changing the bed, changing the sheets.

Q. Okay. Um, now, as I understand it, Rhonda pulls out a weapon, and she holds that in her left hand, and as I took it, that's the same hand that she held the stick in; is that correct?

A. Yes.

Q. And you have the stick; is that correct?

A. No.

Q. You took it away from her, right?

[78]

A. Uh-huh.

Q. Okay, and then that would leave you with the stick?

A. I threw it down. When I grabbed it from her, I throwed it on the floor.

Q. Okay, and then she has this gun; is that correct?

A. Yes.

Q. How come you didn't walk away, at that point in time?

A. I did. I backed up away from both of them.

Q. As I understand it, you were around when the first shot occurred; is that correct?

A. Yes.

Q. So you actually didn't leave the residence, did you?

A. No.

Q. You actually hung around, didn't you?

A. Yes.

Q. You stood there while, as you allege, Rhonda shot him; is that correct?

A. Yes.

Q. Then you're saying you went outside the house and you heard two more gunshots; is that correct?

A. It was around the door when I heard it.

Q. Had you actually exited the residence?

A. I'm not for certain.

Q. You're not for certain?

A. No.

[79]

Q. Well, I thought on direct you said you had made it down the road.

A. No.

Q. Okay. So you hear two more shots; is that correct?

A. Yes.

Q. Can you see Rhonda?

A. No.

Q. Can you see Mr. Hicks?

A. No.

Q. Now, at that point in time, you've only been in three rooms of the house; is that correct? Maybe the kitchen, the dining room and the bedroom?

A. No. I never was in the bedroom.

Q. So only two rooms of the house; is that correct?

A. Right there in that struggle, yes.

Q. So you heard two shots, and you didn't go back to check and make sure Rhonda was okay?

A. No.

Q. Pardon?

A. No.

Q. No, you did not check?

A. No.

Q. You had left her there with a man that you know -- that you believed to have been shot, and then you just left. You heard two more shots. You didn't go back to

[80]

see if she was okay?

A. No.

Q. And this is the girlfriend that you allegedly cared about?

A. Yes.

Q. And you had no idea whether or not there was anybody else in the house, and so you still didn't go back after those two shots?

A. No.

Q. Now, you and Rhonda, you're saying that you, I guess, Rhonda picked you up in Mr. Hicks' truck; is that correct?

A. Yes.

Q. And that was on 10th Street; is that correct?

A. No.

Q. No? Where did she pick you up at?

A. On his driveway.

Q. Okay. Why did you get in the car with her?

A. Because I thought she was going to take me to my truck.

Q. Okay. If you were so upset by what she did, it would make sense that you would want to go the complete opposite direction that she went.

MR. MASLEN: I'm going to object, Your Honor. It's argumentative.

MR. CULLINS: He never said he was upset.

[81]

THE COURT: Sustained.

MR. CULLINS: I'll withdraw the question.

Q. (By Mr. Cullins:) You did get in the truck with her; is that correct?

A. Yes.

Q. At that point in time, you didn't go the opposite direction, did you?

A. What do you mean?

Q. You didn't part way with Rhonda, did you?

A. No.

Q. You didn't just hike on out of town?

A. No.

Q. Now, you got in the truck with Rhonda and you went to Conoco; is that correct?

A. A store, yes.

Q. Okay. A store in Coffeyville, and you went inside to get gas; is that correct?

A. Yes.

Q. And Rhonda stayed outside to use the pay phone, as you say; is that correct?

A. Yes.

Q. Did you tell the clerk in Conoco what Rhonda -- what you allege Rhonda had done?

A. No.

Q. Did you contact the police while you were there in

[82]

Conoco?

A. No.

Q. Did you ask to use the phone so you could contact the police?

A. No.

Q. So you were okay with what you allege Rhonda did then?

A. No.

Q. You weren't okay with it?

A. No.

Q. Well, how come you didn't contact authorities then?

A. I was scared.

Q. Scared of who?

A. Everybody.

Q. Now, you then drove with Rhonda down to where Mr. Hicks' vehicle was ditched; is that correct?

A. Yes.

Q. And I think you indicated that you didn't know where you were at; is that correct?

A. Yes.

Q. Okay. But in direct examination, you recognized some river as the Cimarron River; is that correct?

A. That's what my attorney told me, yes.

Q. So you didn't know until that time?

A. No.

Q. Now, you were there with Rhonda when she ditched

[83]

Mr. Hicks' truck; is that correct?

A. Yes.

Q. Did you look through Mr. Hicks' truck?

A. Just in the glove box.

Q. And I -- you -- you didn't do that at ---

A. I done that before we got there.

Q. And you indicated that you saw the stick that Rhonda had used on Mr. Hicks in the house there in the truck; is that correct?

A. Yes.

Q. So you would allege that Rhonda, after she shot Mr. Hicks, remembered to grab the stick that she had used, remembered to carry out the gun, grab the wallet, grab the cell phone, grab the keys, and went out the door?

A. I'm telling you that's what was in the truck, yeah.

Q. And if all those items were in the house before, it could only have been Rhonda that got all those items in the truck, couldn't it have been?

A. I don't know that all them items was in the house.

Q. When you were at the truck with Rhonda, you didn't just walk away without her, did you, Mr. Ventris?

A. No.

Q. In fact, you continued to walk up the road with her for quite sometime until you got to the Childers store; is

[84]

that correct?

A. Yes.

Q. And you would acknowledge, under your version of the events, you were with her when she disposed of the gun; is that correct?

A. Yes.

Q. Now, when you got to the store, the two of you went in; is that correct?

A. Yes.

Q. And you ordered something to eat; is that correct?

A. Yes.

Q. And Rhonda placed some phone calls; is that correct?

A. Yes.

Q. You observed her place those phone calls; is that correct?

A. I seen her, yes.

Q. And she used the phone that Mrs. Stark provided her; is that correct?

A. Yes.

Q. So you were aware of the fact that Mrs. Stark would allow people to use her phone; is that correct?

A. Yes.

Q. Did you ask Mrs. Stark to use the phone?

A. No.

Q. So you didn't call the police from the store, did you?

[85]

A. No.

Q. You waited in the store with Rhonda, didn't you?

A. Yes.

Q. After that, the two of you ended up back in your house in Dearing; is that correct?

A. No.

Q. Okay. Where did you end up at?

A. At Keith and Marty's house.

Q. Okay. Good memory. So you ended up at Keith and Marty's house, and at that point in time, where did you go?

A. Back to my house.

Q. And you went there with Rhonda; is that correct?

A. Yes.

Q. And then you left two days later; is that correct?

A. No. I left -- I took a shower, changed clothes and then went to my brother's house.

Q. Okay. Your brother -- which brother's house?

A. David.

Q. Okay. And so that would have been on the 7th you went to David's house?

A. Yes.

Q. And then I think it was on the 8th or 9th you saw Billy; is that correct?

A. It was early in the morning on the 8th, same day,

[86]

basically.

Q. Now, eventually, you made it back to your house; is that correct -- or you went back from your brother's house back to your house in Dearing; is that correct?

A. Yes.

Q. And several days elapsed, and then the police searched your house; is that correct?

A. Yes.

Q. And Rhonda was there at your house when the police searched it; is that correct?

A. Yes.

Q. And you were there also; is that correct?

A. Yes.

Q. How many days elapsed between January 7th until when the police searched your house?

A. I left again with my brother for three days, and then when I got back, that's when the police showed up at my house, so I guess it would be about four days.

Q. During those four days, you never contacted the police and told them what you alleged Rhonda did, did you?

A. No.

Q. Now, now that you know where Mr. Hicks lives, wouldn't it be accurately depicted that he lives up the road from your house?

A. I guess.

[87]

Q. Now, you allege that Billy was confused about you making the statement that you had shot a black man; is that correct?

A. What do you mean?

Q. Well, actually, it didn't appear to me that Billy was confused, but you're saying this conversation --

MR. CLARK: I'm going to object, Your Honor. That's commenting on the evidence.

THE COURT: It is. Objection's sustained. The jury shall disregard any superfluous comments that are outside of the questioning format. Go ahead.

Q. (By Mr. Cullins:) Now, you were here when Billy testified; is that correct?

A. Yes.

Q. Billy testified that you told him on January 9th, I believe it was the 9th, that you had shot a black man that lived just right up the road from you for giving drugs to your daughter.

A. Yes. I heard him say that.

Q. Now, you're saying that conversation did not occur in January; is that correct?

A. I'm saying that conversation never occurred, no.

Q. But you're alleging that a similar conversation occurred in December; is that correct?

A. Yes.

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Q. But you're saying that conversation, while it did involve a black man, it didn't involve anybody getting killed; is that correct?

A. Nobody got killed, no.

Q. I mean, in the December conversation when you told him about it.

A. Yes.

Q. Now, this -- this man that you allege was harassing your children, did you report him to the police?

A. No.

Q. What was his name?

A. I don't know.

MR. CULLINS: Judge, I don't believe I have any further questions.

THE COURT: Mr. Maslen?

MR. MASLEN: I don't have any other questions, Your Honor.

THE COURT: All right. Thank you, sir. You can step down. Call your next.

MR. CLARK: Defense rests, Your Honor.

THE COURT: All right. Rebuttal, Mr. Cullins?

MR. CULLINS: Your Honor, the State has one rebuttal witness we'd like to call, and that's Johnny Doser.

THE COURT: All right.

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MR. CULLINS: Judge, I think we probably need a side-bar.

(THE FOLLOWING PROCEEDINGS WERE HAD AT THE BENCH OUT OF THE HEARING OF THE JURY AND THE DEFENDANT.)

MR. MASLEN: We are objecting to the calling of this witness, because Mr. Cullins met with him and he was instrumentally placed in the

same cell with Donnie Ventris in violation of Mr. Ventris' right to counsel, and we don't believe that the fact that this is a rebuttal witness cures the problem of violation of Mr. Ventris' right to counsel.

THE COURT: Are you saying there's case law out there that says that you can't do that? The case law says that you can, doesn't it?

MR. CULLINS: Judge, my representation would be the case law says that I can, that there's an impeachment exception. Yes, I will grant that he was placed in there and there's probably a violation. However, that doesn't give the Defendant unlicensed -- a license to just get on the stand and lie. The fact that he got on the stand and said something completely different than Mr. Doser said allows me to put Mr. Doser on the stand to impeach that statement as a rebuttal witness.

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MR. MASLEN: That's a clear-cut violation of his right to counsel. It's entrapment, almost.

THE COURT: Your objection will be noted for the record, and overruled.

MR. CULLINS: Johnny Doser.

(INTERRUPTION.)

JOHNNY DOSER

called as a witness on behalf of the State of Kansas, having been first duly sworn to tell the

truth, whole truth and nothing but the truth, testified upon his oath as follows:

MR. CULLINS: Have a seat right there.

DIRECT EXAMINATION

BY MR. CULLINS:

Q. Would you state your name, please?

A. Johnny Lee Doser.

Q. And how old are you?

A. 27.

Q. So the jury understands, have you ever been convicted of a crime before?

A. Yes, sir.

Q. And what type of crime have you been convicted of?

A. Theft and a battery charge.

Q. Okay. Any other convictions that you can recall off the top of your head, Mr. Doser?

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A. Larceny.

Q. Now, have you used illegal drugs in the past?

A. Yes, sir, I have.

Q. And what type of illegal drugs have you used before?

A. Methamphetamines and marijuana.

Q. How frequently did you use those, Mr. Doser?

A. For about a good year or so.

Q. Okay. In what year?

A. I'd say it's been about two years ago.

Q. Now, I'd like to direct your attention to the days around January 7th of 2004, okay?

A. Yes.

Q. Were you in jail on that date?

A. Yes, sir.

Q. In fact, you were in the Montgomery County Jail; is that correct?

A. Yes, sir, I was.

Q. Why were you in the Montgomery County Jail?

A. For a probation violation on the battery charge.

Q. How many days had you served in the Montgomery County jail, at that point in time?

A. At that point in time, I'd done six months. I was shipped to a treatment center in Girard, Kansas, at which point I was furloughed to go on to Emporia, Kansas, to Halfway House, Incorporated, and then I was

[92]

arrested from there on a probation violation and brought back to Montgomery County, at which time I'd spent about a total of seven days.

Q. Before the 7th; is that correct?

A. Correct.

Q. Now, do you recall what the probation violation was for?

A. It was for getting kicked out of the Corner House Halfway House.

Q. And what were you on probation for?

A. I was on probation for battery. Simple battery.

Q. Now, there came a point in time when you were asked to be a cell mate of an individual by the name of Donnie Ventris; is that correct?

A. That is correct.

Q. And is he in the courtroom today?

A. Yes, sir, he is.

Q. Seated between the two lawyers; is that correct?

A. That's him right there.

Q. Now, you ended up being a cell mate of Mr. Ventris; is that correct?

A. Correct.

Q. When you were asked to be a cell mate of the Defendant's, what were you told?

A. I was told that he was under suspicion of some charges.

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I wasn't told what, and I was asked if I could get any information out of him, if he'd talk.

Q. Okay, were you -- how were you told to collect this information?

A. Just to keep my ear open and listen ---

Q. Okay.

A. --- to what he had to say.

Q. Were you promised anything in return for listening to what the Defendant had to say?

A. No, I was not.

Q. Now, you were a cell mate of Mr. Ventris for a while; is that correct?

A. That is correct.

Q. Now, there came a point in time when you asked to be removed from that cell; is that correct?

A. That is correct.

Q. And you had sent, I think, a note out that he had made some incriminating remarks to you; is that correct?

A. That is correct.

Q. Now, so the jury will completely understand, after you roomed with Mr. Ventris, the Defendant, and then he made some incriminating remarks to you, you were removed out of his cell; is that correct?

A. That is correct.

Q. Shortly thereafter, the case that you were on probation

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for was terminated; is that correct?

A. That is correct.

Q. And it was terminated upon when you paid the -- what you owed; is that correct?

A. That is correct.

Q. And then you left the State of Kansas; is that correct?

A. That is correct.

Q. And you ended up where? In Colorado?

A. That's correct.

Q. Okay. And you've made the trip back from Colorado to here; is that correct?

A. Yes.

Q. Now, so the jury understands, you are in custody in Colorado; is that correct?

A. That is correct.

Q. And what are you in custody for?

A. Battery.

Q. Now, I want to back up a second and talk to you about remarks the Defendant made to you.

A. Okay.

Q. The first day that you were his cell mate, did he make any remarks to you that you would consider incriminating?

A. All he said to me on that day was that he was in on some ---

[95]

MR. MASLEN: I'm going to object as nonresponsive. If we start a narrative, I don't know how to address irrelevant or immaterial, or otherwise objectionable.

THE COURT: Sustained. Just listen to the question and answer the question, okay?

A. Yes.

Q. (By Mr. Cullins:) The first day, did he indicate that he had killed anybody?

A. No, he did not.

Q. Now, on the second day, did the Defendant indicate that he had killed anybody?

A. Yes, he did.

Q. Did this information come up there in your cell; is that correct?

A. That is correct.

Q. And you were the only person there; is that correct?

A. Yes.

Q. Do you recall what time it was?

A. No. We don't have clocks or calendars in the back, so, no, I do not.

Q. Now, what was the first remark that he made to you -- made to you?

A. First remark he made to me is that he was incarcerated on some drug charges, which is marijuana charges, at

[96]

that time, and then one day had elapsed, and then he asked if he could trust me, okay?

Q. What was your response?

A. I told him, yes, he could trust me. He asked me if what he said to me would stay in the room between us, and I told him, yes, it would.

Q. Okay. And after you told him that, what, if anything, did the Defendant say?

A. Well, he had showed me a piece of paper where the police had arrested him and a suspect in a murder.

Q. Okay. And then -- are you looking at something, Mr. Doser?

A. Yes.

Q. What are you looking at? Your transcribed statement?

A. Right.

Q. Okay. What, if anything, did he -- what happened after that, Mr. Doser, what was the statement made? If you could try to do it from your memory.

A. He said that he really didn't know what the fuck was going on, at that point, and that he was going to show me his hand in just a little bit, and what he meant by showing me his hand is what he was dealing with.

Q. Did he make any remark after that?

A. The remarks he made to me after that was he was going to show me what he did. That him and his girlfriend,

[97]

Rhonda, had went to rob somebody and that it went sour. He'd shot this man in his head and in his chest. That he took his keys, his wallet, about $350.00, and took a vehicle.

Q. Okay. He indicated that he was the person that shot the man; is that correct?

A. That's correct.

MR. CULLINS: I don't believe I have any further questions.

THE COURT: Mr. Maslen?

MR. CLARK: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. MASLEN:

Q. You said that you weren't told what Mr. Ventris was charged with when you were placed in his cell; is that correct?

A. That is correct.

Q. As a matter of fact, information like that runs free in a jail, doesn't it?

MR. CULLINS: Your Honor, I'm going to object. That's speculative. It depends on what jail.

THE COURT: Overruled.

A. Now, what was that?

Q. (By Mr. Maslen:) That's the kind of information that runs free in a jail, isn't it?

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A. It would all depend on if the individual decided to speak about that information.

Q. Well --

A. It wouldn't just run rampant. They'd have to chose to let that information be known.

Q. You're saying that people in the jail don't know what other people are charged with?

A. Not unless you make it public in the jail yourself.

Q. So you hadn't heard from anybody else in the jail what Donnie Ventris was charged with?

A. No, sir, I did not.

Q. There was no rumors in the jail that there was somebody there being held on murder?

A. No, sir.

Q. And, I take it, then, you hadn't received any information from mail, visitors, other jail -- other jail authorities or inmates about any murder in this county?

A. No, sir. You can check the registers. I received no visits. I received no mail while I was here in this county. We're not allowed newspapers and/or news.

Q. Now, you were in the nonviolent offender mod of the jail; is that correct?

A. That's correct.

Q. And Mr. Ventris, at the time that you were approached

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to be his cell mate, was in another part of the facility; isn't that correct?

A. Yes.

Q. So what happens is Mr. Ventris is moved from that other part of the facility into your area in the nonviolent offender part; is that correct?

A. That's correct.

Q. And did you end up writing any kind of notes to the jailors saying that you could help them?

A. The note I'd written to the jailors was saying that Mr. Ventris was going to attempt ---

MR. CULLINS: Your Honor, hold on. Can I approach the bench?

MR. MASLEN: Well, I can just withdraw that question, Your Honor, because I don't think it was responsive anyway.

THE COURT: Okay.

Q. (By Mr. Maslen:) You didn't write a note to a jailor saying I'll help you with this; is that correct?

A. No.

Q. Okay. Were you picked out because you had a relative working in the jail or something?

A. No.

Q. Who approached you about this? Somebody from law enforcement?

[100]

A. Steve Fryback.

Q. Okay, and then you end up, what, being in contact with the county attorney about what you're going to do?

A. No. Actually, all the information that I obtained from that cell was not to go to the county attorney, at all. It was to be delivered straight to a detective, at which point, I made a statement.

Q. So you met with law enforcement or jailors to make -- to make this arrangement; is that correct?

A. That's correct.

Q. And absolutely no promises, whatsoever, were made to you about this?

A. None whatsoever.

Q. You did get early termination of your probation?

A. That's correct.

Q. And you -- it was your understanding that what you were supposed to do was get the goods on Donnie Ventris; is that right?

A. I was just told to see if he would talk about anything.

Q. Okay. The first day, he's not talkative, at all; is that right?

A. That's correct.

Q. Second day, he just kind of starts spilling the beans to you; is that right?

A. The second day I told him that I could tell by the look

[101]

in his eyes that he had something more serious weighing in on his mind.

Q. And when you opened up to him, then he just started talking, right?

A. He'd asked me if he could trust me and he told me he'd show me his hand in a little bit and what he was dealing with.

Q. And as soon as you said, sure, you can trust me, then he starts telling you everything?

A. Right.

Q. You didn't ask him any real details, though; is that right?

A. No. I let him talk to me.

Q. And the reason was you didn't want him to figure out that you were conning him; is that right?

A. I didn't want to push for any information. I didn't want to subject myself to being injured.

Q. So you didn't ask anything that wasn't volunteered?

A. No.

Q. And so Donnie just starts giving you all those details free and clear?

A. That is correct.

Q. And as soon as you get all those details, you contact the authorities and you're out of the jail shortly thereafter; is that correct?

[102]

A. I was out of the cell, not out of the jail.

Q. Okay, and then shortly thereafter, you were out of the jail?

A. Correct.

MR. MASLEN: I don't have any other questions, Your Honor.

MR. CULLINS: No redirect, Your Honor.

* * * *

[Filed May 6, 2005]

[1]

IN THE DISTRICT COURT OF MONTGOMERY COUNTY, KANSAS
14TH JUDICIAL DISTRICT
SITTING AT INDEPENDENCE

STATE OF KANSAS, Plaintiff,	)	
vs.	)	Case No. 04 CR-24 I
DONNIE RAY VENTRIS, Defendant.	)	

TRANSCRIPT OF SENTENCING AND MOTIONS

PROCEEDINGS had in the above-entitled matter before the HONORABLE RAWLEY J. (JUDD) DENT, District Judge of the 14th Judicial District of the State of Kansas, on the 30th day of September, 2004, in Independence, Kansas.

APPEARANCES

For the Plaintiff:	MR. F. WILLIAM CULLINS County Attorney Judicial Center Independence, Kansas 67301
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[2]

THE COURT: All Right. This is State of Kansas versus Ventris, 04 CR-24. Comes on today for motions. Motion for new trial and a motion for imposition of durational and dispositional departure. It was just filed, and I haven't received a copy of it.

(JUDGE REVIEWS DOCUMENT.)

THE COURT: All right. Mr. Clark, are you ready?

MR. CLARK: Yes, Your Honor.

THE COURT: You want to start out with your motion for new trial?

MR. CLARK: That's fine, Judge. In addition, I'd also filed a motion for judgment of acquittal. Those two issues I'll address, and then Mr. Maslen will address the motion for departure and the sentencing related issues.

And the motion for judgment of acquittal, I know the Court's aware of what the standard is

and the law, both of which were set forth in my motion, as well as the basis for that motion. Mr. Cullins has filed a response, and I'll simply rest on my motion as set forth and filed with the Court on the motion for judgment of acquittal.

Regarding the motion for new trial, Judge,

[3]

there are two cases, specifically, that I'd like to address the Court to, both United States Supreme Court cases, the first being United States versus Henry, which is found at 447 U.S. 264, a 1980 case with, basically, identical facts to those present in this case. In that particular case, there was an informant named Nichols, who was housed in the jail. Mr. Henry was arrested and indicted on a robbery charge. Nichols, the informant, met with law enforcement. Law enforcement indicated that, while they didn't want him to question Mr. Henry, he should keep his ears open. Let them know if Mr. Henry said anything. Later, when Mr. Nichols was released from jail, he meets with police, tells them that Mr. Henry has allegedly confessed to his role in the robberies. At trial, the informant, Nichols, testifies about the incriminating statements that were made to him.

On appeal, the Court finds -- the State argues that those statements were voluntary, and that seems to be the test the courts use with regard to when a statement obtained illegally can be used. I don't necessarily disagree with a lot of what

Mr. Cullins says in his reply. The determining factor seems to be the voluntariness or

[4]

involuntariness of the statement. On the one hand, you have a situation where a person, for example, is arrested, mirandized, invokes their right to counsel, but continues to answer questions. The courts deem that a voluntary statement, and hold that while that cannot be used because of the invocation of the 6th Amendment right to counsel during the case in chief, it can be used during the State's rebuttal, as opposed to a situation where it is an involuntary statement, and the case law is clear that an involuntary statement may not be used for any purpose.

The Henry case found that the statement made under those circumstances, which were essentially identical to those in this case, was an example of an involuntary statement and could not be used. The case of New Jersey versus Portash, P-O-R-T-A-S-H, which is found at 440 U.S. 450, a 1979 case, stands for the proposition that involuntary statements may not be used at trial for any purposes, because use of the statements would violate the Defendant's rights.

As set out in our motion for new trial, on January 13th, Mr.. Ventris was arrested. On January 14th, Johnny Doser was solicited to be a cell mate

[5]

to the Defendant and to cooperate and to inform police of any statements that Mr. Ventris may make with regard to involvement in the case that he was charged. Mr. Doser testified at trial as to what those statements were during rebuttal. Mr. Doser indicated in a taped interview on January 21st, when he told police about what the Defendant had told him, that he'd been shown a copy of the arrest warrant for the murder. The arrest warrant was filed the same day that Mr. Ventris was charged, so Mr. Ventris' right -- 6th Amendment right to counsel had attached on that specific case, as of the time that the statement was made. And, again, while that such information could ordinarily be used for impeachment purposes, in a case like this, where it amounts to a constitutional violation itself, it may not be used for any purpose.

The test then becomes, assuming the Court agrees with what I've said so far, even if it's an error of constitutional magnitude, whether or not it was harmless, and I think in this particular case, given that the only evidence against Mr. Ventris was the testimony of Rhonda Theel, and given the nature of that testimony, I don't believe that the finding could be made that it was harmless error

[6]

under the facts and circumstances as they exist in this particular case. And for that reason, it's our request that the Court grant a new trial.

THE COURT: Mr. Cullins?

MR. CULLINS: Judge, I haven't had the opportunity to look at the cases that Mr. Clark had cited, but I think it's pretty clear in the cases that I cited in my first response, in Kansas the issue is -- appears to be that the statement can be used, so long as it's only used to rebut the Defendant's original statement. Now, as for -- and the Kansas cases are clear, every Kansas case talked about a constitutional violation, either of the 4th or 5th Amendment, and in all those cases, the Kansas cases, the State was allowed to use that statement.

Now, with reference whether or not the statement is voluntary, I think the Court could look at Mr. Doser's testimony at the time of trial and make a determination that the statement that the Defendant gave to Mr. Doser was voluntarily -- voluntary under the circumstances. As I recall Mr. Doser's testimony, he said he didn't say anything to the Defendant and, more or less, what the Defendant said to him was spontaneous. I'm

[7]

reaching out to you. I'm in a jam. I can't remember exactly what Mr. Doser testified to, but this is what I did, and Mr. Doser never encouraged him to make those statements towards him, so I think the Court can look at Mr. Doser's statement and find that it was voluntarily. It was pretty much unsolicited remarks made by the Defendant towards Mr.

Doser, and I think the Court can find it voluntary and the statement would be admissible.

That would be the only additional arguments the State would have on the motion for judgment of acquittal. And we would stand on our original motion for new trial, just the arguments and authority set out there, Your Honor.

THE COURT: Well, that was your new trial reasons. Your acquittal was just insufficiency of the evidence, right?

MR. CLARK: That's correct, Your Honor.

THE COURT: Any comment?

MR. CLARK: No.

THE COURT: All right. Well, it's clear to me that the Defendant took the stand, and as far as I'm concerned, this was a subject of proper rebuttal. The next determination that needs to be made is to the voluntariness of the statement, and

[8]

the testimony of Mr. Doser, while I don't know that it made a whole lot of difference, was that supportive of what the State was trying to do, but his testimony was, in my opinion, indicated that it was a complete, spontaneous, voluntary statement. I -- think it was something along the lines that Mr. Ventris asked Mr. Doser if he could trust him, or something like that, and then blurted out this statement that he made

concerning the shooting death of Mr. Hicks, so I don't have a concern about the voluntariness of the statement. Therefore, the Defendant's motion for new trial will be overruled.

Additionally, I don't know what difference it makes, since they acquitted him of the murder trial anyway, so if -- if anything went wrong, it seems to me it would be harmless error.

Insofar as the motion for acquittal is concerned, I don't know. It -- there was conflicting testimony, but I think that the preponderance of the testimony, while somewhat unconnected and sporadic, was supportive of the State's theory and to the charges that the Defendant was convicted of, and that there was sufficient evidence, if the jury so desired, to base a verdict of guilt on, and that's what they

[9]

did. So, as far as I'm concerned, the evidence was sufficient to support the conviction, so, therefore, the motion for judgment of acquittal will be denied.

All right. Anything else, insofar as those motions are concerned. Mr. Clark?

MR. CLARK: No, Your Honor.

THE COURT: Mr. Cullins?

MR. CULLINS: No, Judge.

* * * *

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
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No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant's voluntary statement obtained in the absence of a knowing and voluntary waiver of his Sixth Amendment right to counsel is admissible for impeachment purposes if the defendant testifies untruthfully at his trial?

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JURISDICTION

The Kansas Supreme Court issued its opinion on February 1, 2008. The petition for a writ of certiorari was filed on April 28, 2008, and granted on October 1, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

The Fourteenth Amendment provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

STATEMENT

1. Respondent, Donnie Ray Ventris, was convicted of aggravated robbery and aggravated burglary by a jury in Montgomery County, Kansas. Pet. App. 9a. He was acquitted of felony murder and misdemeanor theft. *Id.* Ventris was sentenced to 247 months for aggravated robbery and 34 months for aggravated burglary. *Id.*

In the early morning hours of January 7, 2004, Ventris and his girlfriend, Rhonda Theel, discussed confronting Ernest Hicks about whether Hicks was abusing the children with whom Hicks was living. Pet. App. 4a. Theel also had been told that Hicks carried large amounts of cash on his person. *Id.* Ventris and Theel eventually made their way to Hicks' residence and confronted him. Hicks was shot and killed, and Ventris and Theel stole Hicks' cell phone and a wallet containing approximately $300 in cash. *Id.* at 5a–6a.

Theel entered an agreement with the State to testify against Ventris and she pled guilty to aggravated robbery and aiding a felon. Pet. App. 6a. During Ventris' trial, Theel testified that Ventris shot and killed Hicks after the two men argued. *Id.* at 6a–7a. Ventris testified in his own defense and claimed that Theel shot and killed Hicks after she and Hicks argued. *Id.* at 7a–8a; Joint Appendix ("J.A.") 56, 92–94.

To impeach Ventris' testimony, the State offered in rebuttal the testimony of Johnnie Doser, a former cellmate of Ventris during the time Ventris was awaiting trial. Pet. App. 8a; J.A. 144-51. The day after Ventris was arrested, the State had recruited Doser to share a cell with Ventris and listen for any statements Ventris might make about the murder of Hicks. *Id.*; J.A. 159. Over Ventris' objection, the trial court allowed Doser to testify. The State's trial counsel essentially conceded that placing Doser in a cell with Ventris violated the Sixth Amendment, *see infra* note *, but the trial court held that Doser's

testimony nonetheless was admissible for impeachment. Pet. App. 9a; J.A. 143.

Doser testified that Ventris told him that the Hicks robbery "went sour" and that Ventris shot Hicks before robbing him of money, keys, and a vehicle. Pet. App. 8a; J.A. 150. In exchange for testifying, Doser was released from his probation. Pet. App. 8a–9a. The jury convicted Ventris of aggravated burglary and aggravated robbery, but acquitted him of felony murder.

2. On appeal, the Kansas Court of Appeals rejected Ventris' argument that admitting Doser's testimony in the State's rebuttal case solely for impeachment purposes violated the Sixth Amendment right to counsel. Pet. App. 59a. The court recognized that this Court's decision in *Michigan v. Harvey*, 494 U.S. 344 (1990), expressly left open the issue Ventris raised. Pet. App. 57a. The court of appeals examined decisions from the lower federal courts and other state courts and found that a majority of jurisdictions have held such statements to be admissible for impeachment purposes, so long as the statements are voluntary. *Id.* at 57a–59a. The court of appeals followed the majority approach and upheld Ventris' convictions.

3a. The Kansas Supreme Court reversed, concluding that Doser's testimony could not be admitted for *any* purpose, even though there was no claim, much less any evidence in the record, that Ventris' statements were involuntary or coerced. The supreme court held that a statement obtained in violation of the rule established in cases such as

Massiah v. United States, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), must be excluded for all purposes: "[o]nce a criminal prosecution has commenced, the defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial *for any reason, including the impeachment of the defendant's testimony*." Pet. App. 20a (emphasis added). The court further held that the admission of Doser's testimony was not harmless error. *Id.* at 23a.

The supreme court acknowledged that "[n]either this court nor the United States Supreme Court has previously addressed the issue presented by the facts of this case." Pet. App. 17a. The court opined that cases such as *Harris v. New York*, 401 U.S. 222 (1971), *Oregon v. Hass*, 420 U.S. 714 (1975), and *Michigan v. Harvey*, all of which permitted unlawfully obtained evidence to be used for impeachment purposes, were distinguishable because they involved law enforcement officials speaking directly with the defendant. In contrast, the statements here "were made to a jailhouse informant who was surreptitiously acting as an agent of the State." Pet. App. 15a.

After reviewing several lower federal and state court cases addressing the issue, the Kansas Supreme Court discerned two approaches:

> The first approach focuses on the court's truth-seeking function by denying the defendant an opportunity to commit perjury without contradiction. This approach ignores *Henry* and

> the requirement that defendants make a knowing and voluntary waiver of their Sixth Amendment right to counsel. The second approach requires a knowing and voluntary waiver of the Sixth Amendment right to counsel. The knowing and voluntary waiver is not dependent upon whether the defendant will have an opportunity to commit perjury.

Pet. App. 19a. Adopting the "second approach," the court rejected the argument that the police conduct here "merely violates a prophylactic rule," *id.* at 21a, opining that the "purity of justice under our Sixth Amendment's constitutional right to counsel cannot be polluted by the subversive conduct of deceitful acquisition of evidence." *Id.*

3b. The Chief Justice dissented. Pet. App. 27a–48a. She argued that Doser's testimony should have been admissible for the limited purpose of impeaching Ventris, so long as Ventris' statements were voluntarily made:

> Although the United States Supreme Court has not addressed this precise issue, it has repeatedly and consistently allowed the admission of evidence and statements otherwise inadmissible in the prosecution's case in chief to be used for purposes of impeachment, except where such evidence was obtained by coercion or was otherwise involuntary.

Id. at 27a.

SUMMARY OF ARGUMENT

The Kansas Supreme Court's decision is wrong. The primary purpose of applying the exclusionary

rule is to deter future police misconduct that would not otherwise adequately be deterred. *Arizona v. Evans*, 514 U.S. 1, 10 (1995). The Court has recognized, however, that the exclusion of relevant, probative evidence imposes high costs on the truth-seeking function of the criminal justice system. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998).

Thus, the Court applies a now familiar cost-benefit balancing analysis in determining the proper scope of the exclusionary rule. In particular, the Court weighs the "rule's general deterrent effect" on future violations, *Evans*, 514 U.S. at 11, against the "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), of applying the rule, costs "which sometimes include setting the guilty free and the dangerous at large," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), as well as undermining "truth-seeking and law enforcement objectives." *Scott*, 524 U.S. at 364–65.

The Court has made clear that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the [constitutional] rights of the party seeking to invoke the rule were violated." *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *Hudson*, 547 U.S. at 591–92 (same); *Evans*, 514 U.S. at 10 (same). Further, applying the exclusionary rule "has always been our last resort, not our first impulse," *Hudson*, 547 U.S. at 591, and the Court has "rejected

'[i]ndiscriminate application' of the rule." *Id.* (quoting *Leon*, 468 U.S. at 908).

The Court has recognized that the same cost-benefit balancing analysis it has applied in the Fourth Amendment and *Miranda* cases is appropriate in determining the scope of the exclusionary rule in Sixth Amendment right to counsel cases. *See, e.g., Nix v. Williams*, 467 U.S. 431, 445 (1984) (exclusion is proper only if the benefits outweigh "the enormous societal cost of excluding truth in the search for truth in the administration of justice"); *Michigan v. Harvey*, 494 U.S. 344, 350–53 (1990) (engaging in the balancing analysis). Thus, the cost-benefit balancing analysis applies here.

The Court's cost-benefit balancing analysis consistently has resulted in recognition of a distinction between unlawfully obtained evidence used in the government's case in chief and such evidence used to impeach a defendant who chooses to testify untruthfully. *See, e.g., Oregon v. Hass*, 420 U.S. 714, 723 (1975) ("the balance was struck in *Harris* [*v. New York*, 401 U.S. 222 (1971)], and we are not disposed to change it now"); *United States v. Havens*, 446 U.S. 620, 627 (1980) ("We reaffirm this assessment of the competing interests . . . ."). Indeed, to date, the Court's cases uniformly permit the use of evidence obtained in violation of constitutional provisions to be used for *impeachment purposes*, so long as the evidence does not consist of compelled or involuntary statements. *See, e.g., Harvey*, 494 U.S. at 351 ("We have mandated the

exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements.").

The same result is proper here. Excluding voluntary statements for all purposes would condone and perhaps even encourage perjury, a result that would subvert the search for truth in the adversary system. *Havens*, 446 U.S. at 626 (the Court has "stressed the importance of arriving at the truth in criminal trials, as well as the defendant's obligation to speak the truth in response to proper questions"). A criminal defendant has a constitutional right both to testify at trial and to the assistance of counsel, but there is no constitutional right to commit perjury. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) ("It is well established that a criminal defendant's right to testify does not include the right to commit perjury."). A rule of total exclusion will impose very real and very high costs on the search for truth. Not only may evidence that is probative and relevant be kept from the jury, but defendants will be permitted to affirmatively present false testimony to the jury.

On the other side of the balancing analysis, a rule of total exclusion at best will have only a highly speculative marginal effect in deterring police misconduct. Kansas acknowledges and accepts the principle that it cannot use the defendant's statements here in the prosecution's case in chief; that application of the exclusionary rule alone provides significant deterrence against police misconduct. Indeed, the only *potential* benefit to the police of intentionally violating a defendant's Sixth

Amendment right to counsel is the *possibility* that the defendant *might* make statements that *might* be helpful to the prosecution at trial *if and only if* the defendant actually testifies and does so *untruthfully*.

Moreover, police officers who engage in intentional violations of the constitutional rights of defendants risk civil liability and professional discipline, the latter potentially including suspension, demotion, or even termination. Both individual law enforcement officers and municipal entities are subject to civil suits under 42 U.S.C. § 1983. Municipalities have no immunity from such suits, and individual officers will lose their qualified immunity if they engage in violations of clearly established constitutional rights. As a result, criminal defendants have become civil rights plaintiffs in section 1983 litigation involving alleged Sixth Amendment right to counsel violations. *See, e.g., Rothgery v. Gillespie County*, 554 U.S. ___, 128 S. Ct. 2578 (2008). Thus, multiple layers of deterrence already exist.

The Court has applied a rule of total exclusion only when constitutional text, in particular the Fifth Amendment privilege against self-incrimination, has effectively demanded such a result. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979) (for exclusionary rule purposes, the key distinction is between compelled or involuntary statements and all other statements unlawfully obtained). Unlike the Fifth Amendment's prohibition on self-incrimination, however, the Sixth Amendment's right to counsel provision grants an affirmative right to the assistance of counsel. It is not on its face a

prohibition on government conduct, nor on its face does the guarantee have anything to do with testimonial evidence. Thus, unlike the Fifth Amendment provision, the Sixth Amendment's right to counsel guarantee does not explicitly suggest a rule of total exclusion.

Finally, this case involves police misconduct that, at most, is at the edge of constitutionality, just on the other side of the line. In fact, in the *Massiah*-type cases, the reason for finding a constitutional violation may be nothing more than that an informant did not listen carefully to or did not follow the directions of police who told him only to listen for statements from the defendant, but not to interrogate or ask questions. *Cf. Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (using an informant who acts only as a "listening post" does not violate the Sixth Amendment).

Thus, the case for exclusion in this setting is even weaker than in the *Michigan v. Harvey*, 494 U.S. 344 (1990), context, where the police directly interrogated the defendant following an invalid waiver of his Sixth Amendment right to counsel. Here, in contrast, there is not even a possibility, much less a significant risk, of police coercion or intimidation. Moreover, a defendant's statement to a cellmate may well be even more reliable than a statement taken by police, whether or not police obtained a valid or invalid waiver of rights.

The Kansas Supreme Court's total exclusion rule goes too far, and subverts rather than promotes the search for truth in the criminal justice system. There

is little marginal benefit from extending the exclusionary rule so far, but there certainly are high costs which result from that extension. The better and more appropriate rule is the one this Court has to date *always* adopted after applying the cost-benefit balancing analysis: evidence obtained in violation of constitutional requirements may be used for impeachment when the defendant testifies untruthfully at trial, so long as the evidence does not consist of involuntary or compelled statements.

ARGUMENT

A CRIMINAL DEFENDANT'S VOLUNTARY STATEMENTS OBTAINED WITHOUT A VOLUNTARY AND KNOWING WAIVER OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL ARE ADMISSIBLE FOR IMPEACHMENT PURPOSES IF AT TRIAL THE DEFENDANT TESTIFIES UNTRUTHFULLY.

I. The Court Has Tailored The Exclusionary Rule To Accomplish Its Remedial Purposes Without Imposing Undue Costs.

The Court engages in a now familiar balancing analysis when it decides whether the exclusionary rule should apply in a particular setting. Specifically, the Court weighs the "rule's general deterrent effect" on future violations, *Arizona v. Evans*, 514 U.S. 1, 11 (1995), against the "substantial social costs," *United States v. Leon*, 468 U.S. 897, 907 (1984), of applying the rule, costs "which sometimes include setting the guilty free and the dangerous at large," *Hudson v. Michigan*, 547 U.S. 586, 591 (2006), as well as undermining "truth-seeking and law enforcement

objectives." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998). Thus, the Court applies the rule to exclude the admission of relevant and probative evidence that is unlawfully obtained only "where [the rule's] deterrence benefits outweigh its 'substantial social costs.'" *Id.* at 363 (quoting *Leon*, 468 U.S. at 907).

The Court has made clear that the "question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether [a constitutional right] of the party seeking to invoke the rule [was] violated." *Illinois v. Gates*, 462 U.S. 213, 223 (1983); *see also Evans*, 514 U.S. at 13 (the Court's more recent cases have rejected "reflexive application of the exclusionary rule" and "emphasized that the issue of exclusion is separate from whether [a constitutional right] has been violated"); *Hudson*, 547 U.S. at 591 (same).

Fundamentally, the exclusionary rule is a remedial device "designed to safeguard against future violations of [constitutional] rights through the rule's deterrent effect." *Evans*, 514 U.S. at 10. As is appropriate for any "remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most efficaciously served." *Id.* at 11; *see also Hudson*, 547 U.S. at 591. Thus, "exclusion may not be premised on the mere fact that a constitutional violation was a 'but-for' cause of obtaining evidence." *Id.* at 592.

In consistently applying the balancing analysis, the Court has explained how it evaluates the

competing interests. Because the exclusionary rule's primary purpose is to ensure future compliance by police with constitutional requirements, *Elkins v. United States*, 364 U.S. 206, 217 (1960) ("The rule is calculated to prevent, not to repair."), the Court has emphasized that, if applying the rule "does not result in *appreciable deterrence*, then, clearly its use . . . is unwarranted." *United States v. Janis*, 428 U.S. 433, 454 (1976) (emphasis added). As a result, if there is "no sound reason to apply the exclusionary rule as a means of deterring misconduct," *Evans*, 514 U.S. at 11, the Court will not do so.

The presence or possibility of some deterrent effect and resulting benefit is only "a necessary condition for exclusion. It is not, of course, a sufficient condition." *Hudson*, 547 U.S. at 596. The Court does not apply the exclusionary rule every time doing so "might deter police misconduct." *United States v. Calandra*, 414 U.S. 338, 350 (1974); *Scott*, 524 U.S. at 368 ("We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."). Rather, deterrent benefits can be, and the Court often has found them to be in particular cases, outweighed by the costs of applying the exclusionary rule.

Thus, not surprisingly, the Court has emphasized that "the exclusionary rule has never been applied except 'where its deterrence benefits out-weigh its 'substantial social costs.'" *Hudson*, 547 U.S. at 594 (quoting *Scott*, 524 U.S. at 363 and *Leon*, 468 U.S. at 907). Further, the Court frequently has emphasized the "grave consequences that exclusion of relevant

incriminating evidence always entails." *Id.* at 595. In addition to "setting the guilty free and the dangerous at large," *id.* at 591, significant social costs include undermining "the ability of courts to ascertain the truth." *United States v. Payner*, 447 U.S. 727, 734 (1980); *Alderman v. United States*, 394 U.S. 165, 175 (1969) (recognizing the strong public interest in having those accused of crime "acquitted or convicted on the basis of all the evidence which exposes the truth").

In sum, it is now well-settled that the Court applies a cost-benefit balancing analysis when it evaluates claims that violations of the Fourth Amendment, the *Miranda* requirements, or the Sixth Amendment right to counsel require the exclusion of evidence as a remedy for unconstitutional police conduct. There is no reason to treat Sixth Amendment right to counsel violations differently, and the Court to date has not done so. *See, e.g.*, *Nix v. Williams*, 467 U.S. 431, 445 (1984) (exclusion is proper for Sixth Amendment right to counsel violation only if the benefits outweigh "the enormous societal cost of excluding truth in the search for truth in the administration of justice"); *Michigan v. Harvey*, 494 U.S. 344, 350–53 (1990) (engaging in the balancing analysis in determining the exclusionary effect of a violation of the Sixth Amendment right to counsel rule of *Michigan v. Jackson*, 475 U.S. 625 (1986)).

Thus, the Court's cost-benefit balancing analysis applies here, and requires weighing the possible future deterrent effect of applying the rule against

the significant present and future social costs of excluding relevant and probative evidence.

II. Statements Unlawfully Obtained May Be Used For Impeachment Unless They Are Involuntary Or Compelled.

A. The Court Has Not Extended The Exclusionary Rule To Prevent The Impeachment Of A Defendant Who Testifies Untruthfully At Trial.

1. As a general rule, the Court has held that evidence obtained in violation of the Fourth Amendment, the *Miranda* requirements, and the Sixth Amendment right to counsel rule of *Michigan v. Jackson*, may be used for *impeachment* purposes, even though not admissible in the government's case in chief. *See, e.g., Walder v. United States*, 347 U.S. 62 (1954) (unlawfully obtained illegal drugs may be used to impeach defendant's untruthful statement that he had never possessed any such drugs); *United States v. Havens*, 446 U.S. 620 (1980) (shirt unlawfully seized from defendant's luggage was admissible to impeach defendant's testimony that he had no knowledge of such a shirt); *Harris v. New York*, 401 U.S. 222 (1971) (voluntary statements obtained in violation of *Miranda* requirements admissible to impeach defendant's untruthful trial testimony); *Oregon v. Hass*, 420 U.S. 714 (1975) (same); *Michigan v. Harvey*, 494 U.S. 344 (1990) (voluntary statements obtained in violation of the waiver rule of *Michigan v. Jackson* are admissible for impeachment).

The analysis of the exclusionary effect of the Sixth Amendment right to counsel violation here parallels the analysis the Court has utilized for Fourth Amendment, *Miranda*, and *Jackson* violations. As explained above, the Court has recognized that the exclusionary rule is a remedial device designed to enforce constitutional rights, but not at any cost. Instead, the Court has balanced the marginal deterrent effect of expanding the exclusionary rule to preclude impeachment use of unlawfully obtained but relevant and probative evidence against the costs that such expanded exclusion will impose on society and the judicial system. To date, the Court has struck the same balance in *every* case: any possible additional future deterrent effects of expanding the exclusionary rule to preclude impeachment are outweighed by the substantial costs of undermining the search for truth and allowing defendants to commit perjury.

2. In Fourth Amendment cases, the Court for more than fifty years has held that unlawfully obtained evidence is admissible to impeach a defendant who testifies untruthfully:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Walder, 347 U.S. at 65. *See also Havens*, 446 U.S. at 627 ("the ends of the exclusionary rules were thought

adequately implemented by denying the government the use of the challenged evidence to make out its case in chief").

Moreover, the Court has made clear in Fourth Amendment cases that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons . . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Court has rejected the automatic exclusion of evidence simply because "a constitutional violation was a 'but-for' cause of obtaining evidence." *Hudson v. Michigan*, 547 U.S. at 592. Instead, the Court has applied the exclusionary rule only when "its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348.

3. In Fifth Amendment cases, the Court has reached the same conclusion. The result is that, unless a statement is involuntary or compelled (situations discussed below in Part II.D.) the Court has refused to exclude statements obtained in violation of the *Miranda* requirements from being used to impeach a defendant's untruthful trial testimony:

> The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct,

> sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Harris, 401 U.S. at 225.

The Court has made clear that "when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Michigan v. Tucker*, 417 U.S. 433, 450 (1974). Further, the Court has recognized that expanding the exclusionary rule to preclude the use of voluntary statements for impeachment risks condoning or even encouraging perjury: "inadmissibility would pervert the constitutional right [to testify] into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Hass*, 420 U.S. at 723.

4. The same rule applies here. The Court has held that once the Sixth Amendment right to counsel has attached, statements elicited from a defendant outside the presence of counsel and not accompanied by a valid waiver violate the right to counsel. *See, e.g., United States v. Gouveia*, 467 U.S. 180, 187–88 (1984); *United States v. Henry*, 447 U.S. 264, 273–74 (1980); *Massiah v. United States*, 377 U.S. 201, 206 (1964). For purposes of deciding the impeachment question presented here, Kansas does not challenge

the concession below that there was a Sixth Amendment right to counsel violation.*

The Court previously has recognized the case in chief versus impeachment distinction in the Sixth Amendment right to counsel context. Indeed, the Court enforced that precise distinction in *Michigan v. Harvey*, 494 U.S. 344 (1990), where the Court limited the exclusionary effect of a violation of the Sixth

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* Although there is no testimony in the record that law enforcement officers directed the informant, Doser, to do anything but "keep my ear open and listen," J.A. 146, and the record is unclear as to whether Doser in fact interrogated or questioned Ventris about the murder at issue here, *id.* at 154–55, the trial prosecutor assumed that a Sixth Amendment right to counsel violation occurred and argued only that Doser's testimony was admissible for impeachment purposes. *See, e.g.*, J.A. 143 (responding to defense objection to permitting Doser to testify, the prosecutor stated "[y]es, I will grant that he was placed in there and there's probably a violation); *id.* at 37 (stating in document opposing Ventris' motion for a new trial that "In the case at bar, the defendant's sixth amendment right to counsel may have been violated."); *id.* at 161–62 (arguing post-trial that Doser's testimony was admissible for impeachment even if there was a Sixth Amendment violation).

On appeal, the Kansas Supreme Court declared that "[t]he State concedes that it violated Ventris' Sixth Amendment right to counsel when it surreptitiously planted Doser in Ventris' jail cell as a human listening device." Pet. App. 10a. Though it may once have been debatable whether a Sixth Amendment violation occurred in this case, the prosecutors throughout the state courts assumed there was a violation, and Kansas does not challenge that assumption here. Thus, as to the merits of the underlying Sixth Amendment violation, "[h]appily, these issues do not confront [this Court] here. From the trial level onward, [Kansas] has conceded [a constitutional] . . . violation. The issue here is remedy." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

Amendment anti-waiver rule established in *Michigan v. Jackson*, 475 U.S. 625 (1986). In *Harvey*, the Court held that a statement obtained in violation of the *Jackson* anti-waiver rule still may be used to *impeach* a defendant's untruthful testimony at trial. Citing and quoting frequently from Fourth and Fifth Amendment exclusionary rule precedents, the Court in *Harvey* concluded that the "speculative" marginal future deterrent effect of extending the exclusionary rule to impeachment was outweighed by the very high costs of excluding relevant, probative evidence from the search for truth and creating the opportunity for defendants to commit perjury. 494 U.S. at 351–52.

Thus, to date, the Court's Fourth, Fifth, and Sixth Amendment cases all hold that, as a general principle, the exclusionary rule should be tailored to permit the use of unlawfully obtained but relevant and probative evidence for *impeachment of a defendant's untruthful trial testimony*. In so doing, the Court has not distinguished between Fourth, Fifth, and Sixth Amendment protections. Rather, the Court has emphasized that the high costs of extending the exclusionary rule to preclude the use of probative and reliable evidence for all purposes outweigh the marginal additional deterrence of future police misconduct that might result from applying a rule of total exclusion.

As explained below in Part II.C., any potential additional deterrent benefit from extending the exclusionary rule to preclude even the impeachment use of statements obtained in violation of the

Massiah rule is outweighed by the high costs of undermining the search for truth and allowing perjured testimony by defendants. Thus, the Court should follow its traditional admonition that prohibiting the admission of unlawfully obtained but relevant and probative evidence "has always been our last resort, not our first impulse." *Hudson*, 547 U.S. at 591.

As discussed below in Part II.D., a rule of total exclusion is appropriate only when statements are compelled or involuntary. In those situations, total exclusion may be required by the express language of the Fifth Amendment, but no language in the Sixth Amendment requires a similar result. Instead, there ultimately is no reason to distinguish the *Massiah*-type violation at issue here from Fourth Amendment, *Miranda*, and *Jackson* violations. Thus, the Court should tailor the exclusionary rule here just as it has always done.

B. The Right To The Assistance Of Counsel Does Not Include A Right To Commit Perjury And Subvert The Jury's Truth-Seeking Function.

"It is well established that a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). To the extent allowing impeachment use of a defendant's own voluntary statements deters defendants from testifying in their own defense, it only deters them from offering untruthful and inconsistent statements, which the right to testify does not encompass anyway. *Id.*

Furthermore, the Sixth Amendment right to the assistance of counsel does not include the right to have counsel assist a defendant in committing perjury. *See, e.g., United States v. Henkel*, 799 F.2d 369, 370 (7th Cir. 1986) ("the defendant was entitled only to ethical representation and had no right to commit perjury or have an attorney appointed to assist him in this endeavor"). As a result, the Court to date *always* has held that a criminal defendant's voluntary statements are admissible for impeachment purposes if a defendant testifies untruthfully. The general admissibility of voluntary statements for impeachment purposes reflects the fundamental purpose of our adversary system—to seek the truth. *United States v. Havens*, 446 U.S. at 626 ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system.").

Both in Sixth Amendment cases in particular and criminal procedure decisions more generally, the Court has recognized that excluding relevant probative evidence for all purposes imposes a very high cost because of the very real danger of effectively condoning or perhaps even encouraging perjured testimony. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 173 (1986) ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*."); *Hass*, 420 U.S. at 722 ("[T]he shield provided by *Miranda* is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."); *Harris*, 401 U.S. at 225 ("Every

criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury.").

In terms of protecting the integrity of the judicial system, there is no reason to treat a Sixth Amendment violation differently than a Fourth Amendment or *Miranda* violation, as the Court already has recognized in *Michigan v. Harvey* and *Nix v. Williams*. *See, e.g.*, *United States v. Lott*, 854 F.2d 244, 249 (7th Cir. 1988) ("the antiperjury considerations that generated the *Harris* line of cases are applicable" to Sixth Amendment violations; "To hold otherwise would pervert [the] Sixth Amendment right to counsel into a right to commit perjury."). Indeed, if anything, the Fifth Amendment provides a stronger basis for a rule of total exclusion, given the explicit textual guarantee against self-incrimination. The Sixth Amendment right to counsel, in contrast, does not expressly address or guarantee testimonial rights. Nor does the right to the assistance of counsel include a right for defendants to be assisted in committing perjury.

For more than fifty years, the Court has recognized the fundamental importance of deterring perjury in order to protect the integrity of the judicial system. *Walder v. United States*, 347 U.S. 62 (1954). At the same time, the Court has never pursued the truth at all costs and without regard for defendants' constitutional rights. Instead, the Court has tailored the exclusionary rule to strike a balance between these sometimes conflicting objectives:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Id. at 65.

C. Once Unlawfully Obtained Statements Are Excluded From The Government's Case In Chief, Any Additional Benefit In Deterring Police Misconduct Is Outweighed By The Substantial Interests In Preventing Perjury And Subversion Of The Jury's Truth-Seeking Function.

1. For exclusionary rule purposes, the Court consistently has drawn a line between barring unlawfully obtained evidence from the government's case in chief and permitting such evidence to be used to impeach defendants who testify untruthfully. That line is appropriate as a general rule for all Sixth Amendment cases, as well as for Fourth Amendment and *Miranda* cases.

Police misconduct is adequately deterred by excluding unconstitutionally obtained voluntary statements from the prosecution's case in chief. In fact, the Court has "never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. at 368.

A rule of total exclusion at best will have only a highly speculative marginal effect in deterring future police misconduct. Indeed, the only *potential* benefit to the police of intentionally violating a defendant's Sixth Amendment right to counsel in the circumstances presented here is the *possibility* that the defendant *might* make statements that *might* be helpful to the prosecution at trial *if and only if* the defendant actually testifies and does so *untruthfully*.

There are at least two flaws in any suggestion that police have incentives to commit *Massiah*-type violations. First, if police use a cellmate informant simply as a listening post, any statements obtained from the defendant will be admissible for *all* purposes. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). Thus, the much stronger incentive for police is to *follow* the law and avoid having informants violate the *Massiah* rule. Second, the possibility that any given defendant actually will testify at trial is often remote and highly speculative. Certainly it does not appear to be the case that most or even a significant percentage of defendants testify at trial, perhaps particularly in the most serious cases such as prosecutions for murder. Thus, law enforcement officers would be risking the loss of evidence for the prosecution's case in chief, as well as the very credible threat of civil litigation against them as explained below, all for a highly speculative and uncertain potential benefit at trial.

2. State and local law enforcement officers who engage in misconduct in violation of clearly established law face the very real threat of civil

litigation under 42 U.S.C. § 1983, including for violations of the Sixth Amendment right to counsel. In fact, the Court's most recent Sixth Amendment right to counsel decision was the result of litigation under Section 1983. *See Rothgery v. Gillespie County*, 554 U.S. ___, 128 S. Ct. 2578 (2008); *see, e.g., Weatherford v. Bursey*, 429 U.S. 545 (1977) (Section 1983 suit alleging violation of the Sixth Amendment right to counsel); *Ayuyu v. Tagabuel*, 284 F.3d 1023 (9th Cir. 2002) (affirming jury verdict in § 1983 suit for violation of Sixth Amendment right to counsel).

If a municipal police or sheriff's department adopted a policy of committing *Massiah* violations, or even engaged in a custom or practice of doing so, or municipal policymakers were deliberately indifferent to the need for more training and supervision of their law enforcement officers, Section 1983 liability could extend to the municipality itself. *See, e.g., Monell v. N.Y. City Dep't of Soc. Servs.*, 436 U.S. 658 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989). Unlike individual law enforcement officials, municipal entities do not have even qualified immunity in § 1983 cases. *Owen v. City of Independence*, 445 U.S. 622 (1980). This Court recently recognized that "[f]ailure to teach and enforce constitutional requirements exposes municipalities to financial liability." *Hudson v. Michigan*, 547 U.S. at 599. Thus, the very real possibility of municipal liability is a significant incentive for local officials to ensure proper supervision and training of their law enforcement officers.

Furthermore, the potential civil liability for individual officers, including possibly for compensatory and punitive damages, as well as attorney's fees, is a significant additional deterrent. Section 1983 litigation against state and local government officials, as well as against municipal entities, is common today.

Indeed, the Court has recognized that "the threat of litigation and liability will adequately deter no matter that [individual officials] may enjoy qualified immunity." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). The Court recently relied on the availability of such civil remedies in determining the proper scope of the exclusionary rule, pointedly declaring that "[a]s far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts." *Hudson*, 547 U.S. at 597–99.

Finally, as the Court has recognized, there are other important considerations that systematically tend to limit constitutional violations by law enforcement officers by providing incentives for those officers to follow the law. Specifically, this Court has recognized and emphasized "the increasing professionalism of police forces, including a new emphasis on internal police discipline," *Id.* at 598, noting that "[n]umerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime for internal discipline." *Id.* at 599. The Court further emphasized that "modern police forces are staffed

with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect," *id.*, and that "the increasing use of various forms of citizen review can enhance police accountability." *Id.*

In fact, substituting the facts of this case for the Fourth Amendment violation at issue in *Hudson v. Michigan*, the bottom line can be stated the same:

> In sum, the social costs of applying the exclusionary rule to [impeachment use of evidence obtained from *Massiah*] violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrences against them are substantial—incomparably greater than the factors deterring [right to counsel violations] when [*Massiah*] was decided [in 1964]. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

547 U.S. at 599.

D. The Court Precludes All Use Of Unlawfully Obtained Statements Only When Such Statements Are Involuntary Or Compelled.

The Court excludes evidence "for *all* purposes only when the evidence is derived from involuntary statements," *Harvey*, 494 U.S. at 351; *see also, Arizona v. Fulminante*, 499 U.S. 279 (1991), or is the product of government compulsion. *New Jersey v. Portash*, 440 U.S. 450 (1979). In other words, unlawfully obtained evidence is excluded for all purposes only when the constitutional provision that makes the statement unlawful—such as the Fifth

Amendment Self-Incrimination Clause—may command a rule of total exclusion. By its terms, the Fifth Amendment prohibits a defendant from being compelled "to be a witness against himself." U.S. CONST. amend. V. Excluding involuntary or compelled statements for all purposes may be the only way to give full effect to the plain language of the Fifth Amendment.

But a rule of total, or even partial, exclusion is not demanded or even suggested by the text of either the Fourth or Sixth Amendments. Unlike the Fifth Amendment privilege against self-incrimination, neither the Fourth Amendment protection "against unreasonable searches and seizures," U.S. CONST. amend. IV, nor the Sixth Amendment right "to have the assistance of counsel," U.S. CONST. amend. VI, expressly requires the exclusion of unlawfully obtained evidence. *See, e.g.*, *Harvey*, 494 U.S. at 351 (unlike the Sixth Amendment, the Fifth Amendment expressly prohibits the use of testimony obtained in violation of its prohibition) (citing *Portash*, 440 U.S. at 459, and *Mincey v. Arizona*, 437 U.S. 385, 398 (1978)); *see also United States v. Patane*, 542 U.S. 630, 639 (2004) (same). Expanding the exclusionary rule to prohibit the admission of relevant, probative evidence for *all* purposes for a violation of the Sixth Amendment right to counsel cannot be justified by reference to constitutional text.

Thus, the impeachment use of evidence obtained in violation of the Fourth or Sixth Amendments does not violate the express terms of any constitutional provision. Rather, from a constitutional standpoint,

such use of unlawfully obtained evidence at most implicates the remedial exclusionary rule, unlike compulsion or circumstances that render a statement involuntary in violation of the Fifth Amendment privilege against self-incrimination.

Nor can a rule of total exclusion in Sixth Amendment cases be justified by a claim that the evidence is inherently unreliable. Unlike involuntary or compelled statements that may, in some cases, be unreliable, voluntary statements obtained in violation of the Fourth or Sixth Amendments are likely to be highly reliable.

The Court has never declared that informant testimony is either inherently unreliable or a constitutionally unacceptable form of evidence. Indeed, the Court has never condemned the use of informants as per se improper. Quite to the contrary, informant testimony is often admitted and relied upon in criminal proceedings, subject always to the defendant's right to cross-examine such witnesses and pretrial disclosure by the prosecution of previous statements of such witnesses and other materials relevant to cross-examination, such as any benefits the witness may receive from the government for testifying. In fact, the informant in this case was cross-examined specifically on whether he received benefits from the government in exchange for serving as an informant, J.A. 154, and the trial judge even instructed the jury to use caution in evaluating the credibility of an informant's testimony. *Id.* at 30 ("You should consider with caution the testimony of an informant who, in exchange for benefits from the

State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence.").

Moreover, the Court already has held that some statements obtained in violation of Sixth Amendment rights are admissible for impeachment purposes. *Michigan v. Harvey*. Moreover, the Court has held that uncounseled pretrial statements may be used if they are introduced to prove offenses with which the defendant was not charged at the time of the interrogation. *Maine v. Moulton*, 474 U.S. 159, 178–80 and n.16 (1985). Thus, it is too late to argue that statements elicited from a defendant outside the presence of his counsel are inherently unreliable.

The critical line is whether the statements to be used for impeachment are involuntary or compelled. The Court has "never prevented [all] use by the prosecution of relevant *voluntary* statements by a defendant . . . ." *Harvey*, 494 U.S. at 351 (emphasis added). There is no claim that Ventris' statements here were the result of compulsion. Nor is there any reason to believe that they are inherently unreliable. Indeed, Ventris has never even alleged either of those circumstances, nor would the record in this case support such claims.

Finally, the Court has held that using an informant merely as a "listening post" does not even violate the Sixth Amendment—and the exclusionary rule is thus not even implicated in many informant cases. *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). At worst, this is a case of police conduct that barely crossed the constitutional line. Ultimately, no factors

present in this case justify or require a rule of total exclusion.

III. The Case For A Rule Of Total Exclusion Is Weaker Here Than It Was In *Michigan v. Harvey*, 494 U.S. 344 (1990), Where The Police Directly Elicited Statements Following An Invalid Waiver.

A. There Is No Risk Of Police Coercion Or Intimidation When A Cellmate Informant Obtains Statements.

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court held that a defendant's rights were violated when police initiated interrogation after a defendant's right to counsel had attached and the defendant had invoked that right, even though the defendant in *Jackson* purported to make a valid waiver of his rights in response to police questioning. In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court held that statements obtained in violation of the *Jackson* rule are still admissible for impeachment if a defendant testifies untruthfully at trial. Although this case presents one of two situations the Court did not expressly address in *Harvey*, the *Massiah*-type violation at issue here is a weaker case for exclusion of a defendant's voluntary statements than a *Jackson* violation.

The issue the Court left open in *Michigan v. Harvey* appears to arise in two contexts, one which involves the possibility of police coercion or intimidation and one which clearly does not, the latter being the situation in this case. The first situation arises when police initiate interrogation

after the right to counsel has attached and the defendant makes statements without even purporting to make a waiver of his rights. That situation is like *Jackson* in that the police initiate the questioning, but unlike *Jackson* in that the defendant does not even purport to waive his rights. *See, e.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977) (the "good Christian burial speech" case).

The second situation is represented by the facts of this case, where the police use an informant to elicit statements from a defendant after the right to counsel has attached. *See, e.g.*, *Massiah v. United States*, 377 U.S. 201, 206 (1964). Such a situation, however, where the defendant is speaking to a cellmate and police are not present, creates absolutely no risk of police coercion or intimidation.

If anything, the situation presented in *Harvey* involved police conduct with far more potential to be coercive or intimidating, because the police initiated contact with the defendant and actively sought a waiver of his right to counsel. In the *Massiah* context, by contrast, the police have no direct contact with the defendant, and thus they have no opportunity by word, deed, gesture, or otherwise to coerce or intimidate the defendant into talking. Quite to the contrary, defendants in *Massiah*-type cases believe they are talking to a friend, colleague, or ally. A rule of total exclusion is only justified when there is a very real threat, or the actual presence, of coercion or intimidation. Those elements are completely missing in *Massiah*-type cases.

Again, if an informant simply acts as a "listening post," any statements a defendant makes are admissible for *all* purposes. *Kuhlmann*, 477 U.S. at 459 (placing an informant in a defendant's cell merely to listen does not violate the Sixth Amendment). No constitutional line is even crossed. The Kansas Supreme Court, in essence, declared that any misstep by an informant, such as asking the defendant a question that a court may later determine amounted to interrogation, automatically and necessarily transforms any statements the defendant makes from being *admissible* for all purposes to being *excluded* for all purposes.

Indeed, this analysis suggests the difficulties that arise from applying the *Massiah* rule. Although Kansas is not challenging that rule, it is worth remembering that criminal defendants in Ventris' position have important constitutional protections against unfair interrogation completely independent of their Sixth Amendment right to counsel as interpreted in *Massiah*. Those constitutional protections include the *Miranda* requirements, which apply to all custodial interrogations by police, and the due process principle that any involuntary statement will be excluded for all purposes. *See, e.g., Colorado v. Connelly*, 479 U.S. 157, 167 (1986) ("coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment").

This case involves a setting in which there is no possibility of police coercion or intimidation, and

there is no risk that a defendant will make an involuntary statement. Yet the cost of applying a rule of total exclusion here is high. On the other side of the balance, as explained above, there is little, if any, additional deterrent benefit to applying a rule of total exclusion. Indeed, if anything, this case presents a weaker claim for total exclusion than the facts in *Michigan v. Harvey*, in which the Court allowed the statements to be used for impeachment. The same result should obtain here.

B. The Ultimate Question Is Whether The Court's Cost-Benefit Balancing Analysis Justifies A Rule Of Total Exclusion, Not Whether There Is A "Core" Right Or A "Prophylactic" Rule At Issue.

Over time, the Court sometimes has spoken in terms of "core" constitutional rights versus "prophylactic" rules. Indeed, some Justices have referred to the *Massiah* rule as "prophylactic" in nature. *See, e.g., United States v. Henry*, 447 U.S. 264, 289 (1980) (Rehnquist, J., dissenting) (*Massiah* "rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right."); *see also, Massiah*, 377 U.S. at 213 (White, J., joined by Clark, J., and Harlan, J., dissenting) ("here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule").

Standing alone, however, such labels are neither constitutionally significant nor necessarily helpful in determining the scope of the exclusionary rule in

particular situations. The Kansas Supreme Court endorsed such labeling here, holding that the use of an informant was not "merely" the violation of a "prophylactic rule," Pet. App. 21a, and thus mandated the total exclusion of Ventris' voluntary statements. But the exclusionary rule remedial issue is not whether *Jackson* or *Massiah* involved "core" constitutional rights or "prophylactic" rules. Rather, the ultimate question in determining the scope of the remedial exclusionary rule is whether a cost-benefit balancing analysis of the competing interests justifies a rule of total, partial, or no exclusion.

Labeling police misconduct as resulting in a "core" or "prophylactic" violation may be judicial shorthand for how a court balances the interests in determining the scope of the remedial exclusionary rule. But, standing alone, the labels "core" and "prophylactic" are not constitutional talismans. Rather, only an objective cost-benefit balancing analysis of the important factors the Court typically considers in exclusionary rule cases—such as the prevention of perjury and the protection of constitutional rights by deterring police misconduct—will lead to a properly tailored remedial exclusionary rule.

In Fourth Amendment cases the Court does not speak in terms of "core" violations or "prophylactic" rules. Nor was it clear for many years whether the Miranda requirements were "core" Fifth Amendment principles or "prophylactic" rules, though the Court more than once spoke of *Miranda* as prophylactic in nature. In *Dickerson v. United States*, 530 U.S. 428 (2000), however, the Court held that Congress could

not alter *Miranda* by statute, while nonetheless making no suggestion that such a conclusion in any way affected the Court's repeated holdings that voluntary statements obtained in violation of *Miranda* requirements are admissible for impeachment purposes, such as *Oregon v. Hass*, 420 U.S. 714 (1975), *Michigan v. Tucker*, 417 U.S. 433 (1974), and *Harris v. New York*, 401 U.S. 222 (1971).

Thus, it was not sufficient for the Kansas Supreme Court to label this case as one involving a "core" Sixth Amendment violation and then automatically declare that Ventris' statements must be excluded for all purposes. The issue is not whether the *Massiah* line of cases represents a prophylactic or core rule. Rather, recognizing that the exclusionary rule is remedial in nature, the inquiry is whether total exclusion of Ventris' voluntary statements is warranted under the Court's cost-benefit balancing analysis. Further, that balancing analysis must take into account its remedial purpose and recognize that the evidence in question already is excluded from the prosecution's case in chief.

A rule of total exclusion imposes high costs on the integrity of the judicial system, and does so in a context in which there is not even the potential for police coercion or intimidation. Nor are there significant police incentives to violate the *Massiah* rule; indeed there are stronger incentives to follow the law so that the prosecution can use any statements obtained for all purposes. *See Kuhlmann.* On the other side of the balance, a rule of total exclusion will prevent the jury from hearing relevant

and probative evidence, as well as condone and perhaps even encourage perjury by criminal defendants. For the reasons set forth above, a remedial rule requiring total exclusion of the defendant's voluntary statements is not warranted in this case.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed, and Respondent Ventris' convictions and sentences should be reinstated.

Respectfully submitted,

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RESPONDENT'S BRIEF

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Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether a criminal defendant's statement obtained in deliberate violation of his Sixth Amendment right to counsel and in circumstances of dubious reliability (a jailhouse "informant"), may nonetheless be admitted as affirmative rebuttal evidence where the defendant testifies in his own defense?

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STATEMENT OF FACTS

The prosecutor filed a complaint with an accompanying affidavit and application for arrest warrant charging Rhonda Theel and Donnie Ray Ventris with felony murder and other charges. Joint Appendix ("J.A.") 18.

After the state arrested Mr. Ventris, the State recruited an informant, Johnnie Doser, and placed him in Mr. Ventris' cell. Pet. App. 8a. Doser said that he "was asked if [he] could get any information out of [Mr. Ventris]." J.A. 146. Doser indicated that the first day in the cell with Mr. Ventris, he did not obtain any incriminating statements. J.A. 148-49, 154. On the second day in the cell together, Doser told Mr. Ventris that he "could tell by the look in [Mr. Ventris'] eyes that he had something more serious weighing in on his mind." J.A. 154. Doser testified that Mr. Ventris asked whether Doser could be trusted. Doser testified that he assured Mr. Ventris of his trustworthiness. J.A. 149, 154-55. Doser claimed that Mr. Ventris then made incriminating statements regarding the alleged offenses. J.A. 150.

The state entered into a plea bargain with Theel to procure her testimony against Mr. Ventris on capital charges. Pet. App. 6a. At jury trial, Theel implicated Mr. Ventris in the murder. Pet. App. 7a. Mr. Ventris testified in his own behalf, denying culpability in the incident. J.A. 56, 112.

The state subsequently sought to introduce Doser's testimony regarding Mr. Ventris' alleged statements. J.A. 142. Mr. Ventris objected, asserting that any statements obtained by Doser violated Mr. Ventris' right to counsel. J.A. 142-43. The prosecutor indicated that "I will grant that [Doser] was placed in

there and there's probably a violation. However, that doesn't give the Defendant unlicensed—a license to just get on the stand and lie." J.A. 143. The state trial court overruled the objection and allowed Doser's testimony. J.A. 143. "In exchange for Doser's testimony, the State released him from probation." Pet. App. 8a-9a.

The jury acquitted Mr. Ventris of felony murder and theft, but convicted him of aggravated robbery and aggravated burglary. Pet. App. 9a.

Mr. Ventris filed a timely motion for new trial renewing the Sixth Amendment claim. J.A. 31-34. Specifically, Mr. Ventris alleged that:

> Johnnie Doser, then an inmate at the Montgomery County Jail, was solicited by the Montgomery County Attorney to be a cell mate of the defendant's following the defendant's arrest, and following the defendant's assertion of his right to counsel. Upon Doser's agreement to cooperate with police, he became an agent of the state.

J.A. 32. In its written response to the motion for new trial, the prosecutor indicated that "[t]he State agrees with the defendant's statement of the facts," and further conceded that "[i]n the case at bar, the defendant's sixth amendment right to counsel may have been violated." J.A. 36-37. The state trial court found that the statements obtained by Doser were voluntary and overruled the motion for new trial. J.A. 163.

After the state trial court imposed a 281-month prison sentence, Mr. Ventris appealed directly to the Kansas Court of Appeals. Pet. App. 9a. In his brief to the Kansas Court of Appeals, Mr. Ventris included a claim that admission of Doser's testimony during

rebuttal violated the Assistance of Counsel Clause. Pet. App. 9a. In its response brief, the state conceded that "[t]he State does not deny that obtaining a statement under such circumstances generally renders such statement inadmissible for proof of the case in chief." Resp. Br. of Appellee at 3, *State* v. *Ventris*, 176 P.3d 920 (Kan. 2008) (No. 94,002). The Kansas Court of Appeals noted that "[t]he State conceded the Sixth Amendment violation but argued the testimony could be used for impeachment purposes," Pet. App. 55a, and later indicated that "[t]he State accurately concedes that through the use of an informant, it initiated a discussion with Ventris in violation of his Sixth Amendment right to counsel." Pet. App. 57a. The Kansas Court of Appeals concluded that such statements could be used for impeachment purposes. Pet. App. 57a.

Mr. Ventris petitioned for review to the Kansas Supreme Court. Pet. App. 9a. The prosecution did not cross-petition for review nor did it file a supplemental brief before the Kansas Supreme Court. J.A. 4. The Kansas Supreme Court granted review and, in its decision, reiterated that "[t]he State concedes that it violated Ventris' Sixth Amendment right to counsel when it surreptitiously planted Doser in Ventris' jail cell as a human listening device." Pet. App. 10a. The Kansas Supreme Court went on to hold that the statements obtained in direct violation of the Sixth Amendment right to counsel could not be used for any purpose in the trial of the charges to which that right to counsel had attached and that the erroneous admission was

not harmless beyond a reasonable doubt. Pet. App. 22a-23a.[1]

The Kansas Supreme Court also separately held that the district court had failed to make adequate findings regarding admission of prior bad acts at trial. Pet. App. 24a-26a. Because the Kansas Supreme Court reversed and remanded on Sixth Amendment grounds, it did not reach the issue of whether this independent holding would require reversal of the conviction. Pet. App. 26a.

SUMMARY OF ARGUMENT

The question is whether the prosecution may impeach an accused's testimony at trial by use of a prior inconsistent statement made to a jail house informant when the accused was not made aware that he was speaking to an informant, did not have counsel's assistance and did not waive the right to counsel. The answer is no. The use of an

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[1] After the Kansas Supreme Court filed its decision, the State filed a "Notice of Intent to Appeal to the United States Supreme Court" in the state trial court, Br. in Opp'n ("BIO") App. B, but never sought to stay the appellate mandate. By rule, the Kansas Supreme Court's mandate ordering a new trial issued on February 25, 2008. BIO App. A. The State did not try Mr. Ventris within 90 days, as required by Kan. Stat. Ann. § 22-3402. On June 1, 2008, Mr. Ventris filed a motion for discharge, which the trial court denied. BIO App. C. On July 10, 2008, Mr. Ventris filed a motion with the Kansas Supreme Court seeking enforcement of its mandate. BIO 10. But after this Court granted the petition for a writ of certiorari, the Kansas Supreme Court issued an order without further explanation, indicating that it did not have jurisdiction to entertain a motion to enforce its own mandate. J.A. 6. As a result, the issue of whether, regardless of any decision of this Court, Mr. Ventris is entitled to relief under Kan. Stat. Ann. § 22-3402, remains unresolved by the state court of last resort.

uncounseled statement at trial, even for impeachment purposes, violates an accused's right to counsel because it necessarily impairs counsel's ability to subject the prosecution's evidence to the adversarial testing the Sixth Amendment requires.

Petitioner concedes that it violated Mr. Ventris' right to counsel, but argues that there must be some impeachment exception for Sixth Amendment right to counsel violations. Specifically, petitioner argues that the remedy is merely to permit impeachment in all cases, even when the violation is deliberate. Petitioner's argument assumes application of an exclusionary rule, but would allow consideration of the same exclusionary rule factors that apply to violations of the Fourth Amendment, and the prophylactic rules that ensure knowing and voluntary waivers under *Miranda* and *Jackson*. But this argument simply assumes that an exclusionary rule for the Assistance of Counsel Clause must necessarily follow the rules for Fourth Amendment, *Miranda*, and *Jackson*, without examining the meaning of the Assistance of Counsel Clause or assessing what a violation of the Clause entails.

The right to counsel is the accused's right to have an advocate on his behalf during every critical stage of a prosecution who can subject the prosecution's evidence to adversarial testing through skillful and informed examination. Counsel's absence from an interrogation impairs counsel's ability to subject the resulting testimony to the adversarial testing the Sixth Amendment right to counsel demands. The violation of the right to counsel is not just the manner in which the police obtain uncounseled statements from the accused, but the actual use of those statements at trial.

Thus, a Sixth Amendment exclusionary rule that allowed use of uncounseled statements for impeachment would not deter violations of the right to counsel, but would ratify and encourage them. The only rule that would provide an adequate remedy for violations of the Sixth Amendment right to counsel, and the violation in this case, is exclusion from trial for all purposes, including impeachment. Any other rule would seriously undermine the adversarial system, which the Sixth Amendment does not permit.

Moreover, the logical and practical implication of the Sixth Amendment makes uncounseled statements inadmissible for any purpose. The Assistance of Counsel Clause forbids anything that would deny the right it guarantees. The use of uncounseled statements at trial, even for impeachment, denies that very right.

Even if an exclusionary rule for Assistance of Counsel Clause violations were to permit impeachment, the Court should limit the exception to just those instances the petitioner argues it is necessary—when an accused testifies untruthfully. An exception for any type of impeachment sweeps too broadly than is necessary to protect the interest petitioner claims.

ARGUMENT

I. THE SIXTH AMENDMENT MAKES UNCOUNSELED STATEMENTS INADMISSIBLE FOR ANY REASON BECAUSE THEIR USE AT TRIAL, EVEN FOR IMPEACHMENT, UNDERMINES THE ADVERSARY PROCESS.

A. Exclusionary Rules Allow For An Impeachment Exception Only When The Use Of Tainted Evidence At Trial Does Not Violate An Enumerated Constitutional Right Essential To A Fair Trial.

1. There is no single exclusionary rule, but several. The Fourth Amendment exclusionary rule makes evidence obtained in an unreasonable, warrantless search or in a search executed in reliance on an invalid warrant generally inadmissible. *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995). The Confrontation Clause demands exclusion of testimonial hearsay statements when the prosecution does not make the declarant available for cross-examination. *Crawford* v. *Washington*, 541 U.S. 36, 59 (2004). Similarly, the Self-Incrimination Clause prohibits compelling an accused to be a witness against himself. U.S. Const. amend V. The Self-Incrimination Clause contains its own, self-executing exclusionary rule. *United States* v. *Patane*, 542 U.S. 630, 640 (2004) (plurality opinion).

This Court has also recognized prophylactic rules with exclusionary components to safeguard enumerated constitutional rights. The *Miranda* rule is a judicially-created prophylactic rule designed to protect the right against self-incrimination by "creat[ing] a presumption of coercion [in custodial interrogations] in the absence of specific warnings...."

Patane, 542 U.S. at 639. In *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981), this Court recognized a related rule that created a presumption that a defendant's waiver of his right to counsel under *Miranda* was invalid if it resulted from a police-initated interrogation. The Court also recognized an analogous rule related to waiver of the Sixth Amendment right to counsel in *Michigan* v. *Jackson*, 475 U.S. 625, 632 (1986).

2. The exclusionary rules for violations of the Fourth Amendment, *Miranda*, and *Jackson*, permit the use of tainted evidence to impeach an accused's trial testimony. The common feature of these rules is that the use of the tainted evidence does not violate an enumerated Constitutional right an accused is to enjoy at trial. Exclusion under these rules is a prophylactic measure to safeguard an enumerated right.

The Fourth Amendment exclusionary rule permits an impeachment exception because it only seeks to deter various proscribed police practices, and the use at trial of evidence obtained by those practices does not itself violate the Fourth Amendment. The Fourth Amendment exclusionary rule is always a prophylactic measure designed to deter police misconduct. *Chimel* v. *California*, 395 U.S. 752, 766 n.12 (1969). Admitting illegally obtained evidence at trial does not violate the Fourth Amendment itself. *United States* v. *Calandra*, 414 U.S. 338, 354 (1974). The constitutional violation lies in the police conduct that tainted the evidence, such as, for example, executing a search in reliance on a facially deficient warrant. *United States* v. *Leon*, 468 U.S. 897, 906, 923 (1984). Even the admission of tainted evidence in the prosecution's case-in-chief would not violate the Fourth Amendment. *Evans*, 514 U.S. at 10. Only

an exclusionary rule prevents its admission in the case-in-chief. *Calandra*, 414 U.S. at 354. Relaxing the rule to allow the admission of the tainted evidence for impeachment does not offend the Fourth Amendment. *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

Admitting voluntary statements obtained in violation of *Miranda* does not violate the Fifth Amendment. *Harris* v. *New York*, 401 U.S. 222, 224 (1971). The Self-Incrimination Clause only prohibits the use of involuntary statements. If statements are voluntary, then their use at trial, even in the prosecution's case-in-chief, would violate only the prophylactic rule of *Miranda*, not the Self-Incrimination Clause, and the relaxation of the rule to permit the use of tainted evidence for impeachment does not offend the Fifth Amendment. *Patane*, 542 U.S. at 639.

This Court recognized a similar prophylactic rule for assessing the validity of waivers of the Sixth Amendment right to counsel. *Jackson*, 475 U.S. at 632. If an accused invokes the right to counsel at arraignment, his subsequent waiver of the right is invalid if he makes it in the course of a police-initiated interrogation. *Id.* at 635. But the use of statements made subsequent to a waiver of the right to counsel does not violate the Sixth Amendment itself. *Michigan* v. *Harvey*, 494 U.S. 344, 352 (1990). If the prosecution can establish that the accused knowingly and voluntarily waived the right to counsel, his statements are admissible for impeachment, even though the police obtained the waiver in violation of the prophylactic rule in *Jackson*. *Id.* at 354. In fact, the *Harvey* Court declined to adopt the holding the petitioner proposes, even though it would have been equally dispositive

and made the holding the Court actually adopted irrelevant. *Id.*

3. However, this Court has never permitted an impeachment exception for violations of trial rights enumerated in the constitutional text. The Self-Incrimination Clause applies "in any criminal case" and allows no exception for impeachment: "we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing [to prevent perjury], therefore, is not simply unnecessary. It is impermissible." *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979). Similarly, the Confrontation Clause applies "[i]n all criminal prosecutions" and allows no exception for impeachment. *Crawford*, 541 U.S. at 42, 59 n.9 (alteration in original). This Court noted that both of these trial rights insured the integrity of the adversarial process. *Id.* at 61-62; *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964) ("[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay.").

4. The exclusionary rule for Assistance of Counsel Clause violations need not follow the logic of the rules for the Fourth Amendment, *Miranda*, and *Jackson*. Each of these rules has its own origins, purposes, and policies. It stands to reason they would not have the same contours or dictate the same results. "[R]emedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981).

Petitioner leaps to the conclusion that the Assistance of Counsel Clause requires an exclusionary rule that follows the logic of the Fourth Amendment, *Miranda*, and *Jackson*. But unlike the

Fourth Amendment, the Sixth Amendment right to counsel is a right an accused is to enjoy a trial. Nor is the Sixth Amendment right to counsel a mere prophylactic rule like *Miranda* or *Jackson*—it is itself the right. The logic of the exclusionary rules for the Fourth Amendment, *Miranda*, and *Jackson*, would impermissibly compromise the Sixth Amendment right to counsel. Instead, the logic of the exclusionary rules of the Self-Incrimination Clause and the Confrontation Clause applies to the Assistance of Counsel Clause. The logical and practical implication of the Sixth Amendment text makes uncounseled statements inadmissible at trial, even for impeachment purposes.

B. The Right To Counsel, Guaranteed By The Assistance Of Counsel Clause Of The Sixth Amendment, Is Essential To A Fair Trial.

1. The Framers understood the right to counsel to include aid in attacking the prosecution's evidence in an adversary process. The right to counsel, as embodied in the Assistance of Counsel Clause, has remained constant, even as criminal procedure has changed to include the routine use of pretrial police interrogation.

The Assistance of Counsel Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The Framers understood the assistance of counsel to mean that the accused should have a champion in an adversarial system, exposing the weaknesses in the prosecution's evidence through skilled and informed examination. English common law did not recognize the right to assistance of counsel in felony cases. William M. Beaney, The

Right to Counsel in American Courts 9 (1955). Judges could exercise their discretion and permit an accused to have counsel, but then limit counsel's assistance to supplying answers to purely legal questions the accused himself suggested. James J. Tomkovicz, The Right to the Assistance of Counsel: A Reference Guide to the United States Constitution 8 (2002). Rejecting the English rule, the American colonies almost without exception permitted an accused to have counsel in felony cases. *Powell* v. *Alabama*, 287 U.S. 45, 64-65 (1932). More importantly, the American colonies rejected the rule limiting counsel's assistance to answering the accused's legal questions and permitted the assistance of counsel to expose the prosecution's evidence to an adversary's scrutiny. *United States* v. *Wade*, 388 U.S. 218, 224-25 (1967); Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 Yale L.J. 1000, 1033-34 (1964). Because the assistance of counsel includes help in marshalling facts in an accused's defense and attacking the prosecution's evidence, this Court has recognized that the Assistance of Counsel Clause necessarily means that an accused shall enjoy the right to counsel before trial to help him prepare his defense. *Powell*, 287 U.S. at 56-57, 71.

Although the Assistance of Counsel Clause has not changed since the adoption of the Sixth Amendment, criminal procedure has. One innovation of criminal procedure is the use of pretrial interrogation. "[T]he routine practice [of custodial police interrogation] is itself a relatively new development." *Dickerson* v. *United States*, 530 U.S. 428, 435 n.1 (2000). Consequently, this Court has recognized that the Assistance of Counsel Clause guarantees the right to have counsel present at every stage of a prosecution

when counsel's presence is necessary to protect an accused's right to a meaningful defense, including during surreptitious pretrial interrogations. *Massiah* v. *United States*, 377 U.S. 201, 206-07 (1964).

2. The right to counsel complements the other trial rights of the Sixth Amendment as part of an adversarial system. "The right to the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments is indispensable to the fair administration of our adversarial system of criminal justice." *Maine* v. *Moulton*, 474 U.S. 159, 168 (1985). This Court explained in *Powell*,

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

287 U.S. at 69. The right to counsel requires testing of the prosecution's evidence in an adversarial process, even if that process sometimes impairs the truth-seeking function of a criminal trial. For

example, counsel may pursue a defense seeking an acquittal, even when the accused is actually guilty. *Wade*, 388 U.S. at 256-57 (White, J., dissenting in part and concurring in part). Moreover, the assistance of counsel permits a defendant to deploy his other constitutional rights in his defense, even if those rights impede the search for truth, as when counsel assists an accused in a motion for discharge for violation of the Speedy Trial Clause. *Moulton*, 474 U.S. at 169.

3. The Sixth Amendment rights not only guarantee a fair trial, but define it as one that provides an adversary process. The right to counsel is the most important of the rights enumerated in the Sixth Amendment. *United States* v. *Cronic*, 466 U.S. 648, 653-54 (1984). These rights are not only essential to a fair trial, but define what constitutes a fair trial. *United States* v. *Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). The Sixth Amendment creates an adversarial system and commands the provision of numerous rights to the accused in a criminal trial:

> The requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his constitutional rights—these are all characteristics of the accusatorial system and manifestations of its demands.

Watts v. *Indiana*, 338 U.S. 49, 54-55 (1949) (plurality opinion).

These trial rights sometimes impair the fact-finding function of a criminal trial. For example, the remedy for a Speedy Trial Clause violation is dismissal of the prosecution, even if that means a guilty person would go free without standing trial. *Strunk* v. *United States*, 412 U.S. 434, 439-40 (1973).

As this Court explained in *Gonozalez-Lopez*, "the purpose of the rights set forth in that Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." 548 U.S. at 145. With respect to the particular right to counsel of choice, the Court held that "it commands, not that a trial be fair, but that a particular guarantee of fairness be provided." *Id.* at 146. Ultimately, the fairness of a trial depends not on the reliability of the results, but on the extent to which the accused enjoyed the rights enumerated in the Amendment in reaching that result.

4. Use of uncounseled statements infringes on the accused's right to counsel and fatally undermines the adversary process. That process requires testing the truth of the state's allegations under the attack of an experienced advocate in a public trial. Trials should focus on whether the accused actually committed the conduct charged, not whether he could be fooled or forced in a private interrogation into saying he did.

> "We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."

Escobedo v. *Illinois*, 378 U.S. 478, 488-89 (1964). The use at trial of uncounseled statements extracted from an accused in a pretrial interrogation would "make the trial no more than an appeal from the interrogation; and the 'right to use counsel at the formal trial (would be) a very hollow thing (if), for all practical purposes, the conviction is already assured by pretrial examination. . . . One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at the trial."'" *Wade*, 388 U.S. at 226 (quoting *Escobedo*, 378 U.S. at 487-88).

Counsel's absence from these interrogations creates difficulties in recreating their circumstances so counsel cannot effectively attack the evidence obtained from them as the adversarial process requires. *Id.* at 225-26. "That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court." *Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966). Denying a defendant his right to counsel is akin to denying him the right to present his case. See *Moulton*, 474 U.S. at 168-71. Only when the defendant has been granted access to counsel, freely available during all critical stages in the prosecution, can he make an informed judgment about whether or when to make statements and how to conduct himself. See *id.*

C. The Sixth Amendment Forbids An Impeachment Exception For Uncounseled Statements Because Their Use At Trial For Any Reason Violates The Assistance Of Counsel Clause And Undermines The Adversary Process.

1. A violation of the Assistance of Counsel Clause arises not only from the use of uncounseled statements at trial, but from the manner in which the prosecution obtained them. See *Massiah*, 377 U.S. at 206. This Court's precedents explain that *the use at trial* of uncounseled statements violates the Assistance of Counsel Clause. Prosecutors and police officers have an obligation to respect an accused's right to counsel.[2] *Moulton*, 474 U.S. at 170-71. But the Assistance of Counsel Clause is more than a prophylactic rule to prevent police-initiated

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[2] Petitioner's *amici* make the remarkable suggestion that this Court should disregard the law of this case on two points that are central to the question presented; (1) whether a constitutional violation has occurred at all; and (2) whether the jailhouse informant deliberately elicited Respondent's statements. *See* Br. of Crim. Justice Legal Found. at 6-7 (the underlying question of whether a core Sixth Amendment violation occurred is "fairly included in the question presented"); Brief for the U.S. at 17 n.5 (the "better view" is that "there was no threshold violation of Sixth Amendment standards"). To the extent they are correct, the proper result is dismissal for, as Petitioner concedes, the question presented concerns the scope of the remedy for such a violation. Pet'r Br. at 18-19. To the extent that the aim of Petitioner and its amici in engaging in this discussion is somewhat different—to persuade the Court to adopt a different perspective on the underlying issues—that represents nothing more than a post hoc effort to mitigate Petitioner's own concessions, *see* Pet. App. 10a, 56a-57a, and should not be countenanced by the Court. Petitioner and its amici made no such disclosures to the Court at the certiorari stage.

interrogations of the accused—the actual use of the accused's uncounseled statements violates the Sixth Amendment. *Weatherford* v. *Bursey*, 429 U.S. 545, 558 (1977); *Morrison*, 449 U.S. at 365; *Wade*, 388 U.S. at 240-43. As the Court held in *Massiah*, an accused is "denied the basic protections" of the right to counsel "when there [is] used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206; see also *Nix* v. *Williams*, 467 U.S. 431, 456 (1984) (Stevens, J., concurring in judgment) ("If the trial process was not tainted as a result of [the pretrial interrogation], this defendant received the type of trial that the Sixth Amendment envisions."). Petitioner and the Solicitor General of the United States concede these points. Br. of Pet'r at 18-19; Br. for the U.S. at 17 n.4.

The Assistance of Counsel Clause guarantees an accused the assistance of an advocate who can subject the prosecution's evidence to adversarial testing. If the prosecution is allowed to use uncounseled statements at trial, even just for impeachment, the prosecution is functionally tying counsel's hands before the parties even walk through the courtroom doors. No less than when it is elicited during pre-trial interrogation, presentation of the statement during trial interferes with attorney-client relationship by preventing the defendant from choosing to stay silent on his counsel's advice. Counsel's role also includes pre-trial negotiation and an obligation to create an accurate record that mitigates a defendant's risk and either negates or blunts the force of the prosecution's adversarial position. Counsel cannot fully perform those functions when the prosecution, in knowing

violation of no less a law than the Constitution,[3] perverts the record by eliciting purported statements from counsel's client.

2. The logic of the exclusionary rules for the Fourth Amendment, *Miranda*, and *Jackson* cannot apply to the Sixth Amendment. The Constitutional violation from a pretrial interrogation occurs only when the prosecution uses uncounseled statements from that interrogation at trial. The injury suffered is the undermining of the adversarial process from counsel's inability to subject those statements to the same level of adversarial scrutiny counsel could have had he been present at the interrogation. *Wade*, 388 U.S. at 240-43. Petitioner's proposed remedy would not address this injury. To the contrary, it would ratify the investigative techniques employed in this case, in deliberate violation of the defendant's right to counsel, and would encourage similar conduct by law enforcement in the future. The Sixth Amendment cannot countenance this result. Cf. *Missouri* v. *Seibert*, 542 U.S. 600, 620 (2004) (Kennedy, J.,

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[3] There can be little doubt, despite the Solicitor General's protestations, that the violation of the right to counsel in this case was deliberate. Mr. Doser, the informant, testified on cross-examination as follows:

> Q. Okay, and then you end up, what, being in contact with the county attorney about what you're going to do?
>
> A. No. Actually, all the information that I obtained from that cell was not to go to the county attorney, at all. It was to be delivered straight to a detective . . .

JA 153. This exchange demonstrates that the detective had placed Mr. Doser in Mr. Ventris's cell with the intent of extracting information from Mr. Ventris (without his counsel present), and had in fact instructed Mr. Doser specifically to obtain relevant information and pass it on to law enforcement.

concurring) (statements taken after a "deliberate" violation of a defendant's rights are subject to a "different" exclusionary rule analysis and must be excluded in order to deter police misconduct).

3. An impeachment exception for Assistance of Counsel Clause violations would sanction violation of the very right Petitioner's proposed rule of exclusion aims to protect. Although the use of evidence obtained in violation of the Fourth Amendment, *Miranda*, and *Jackson* does not violate an enumerated constitutional right, the use of uncounseled statements violates the right to Assistance of Counsel as enumerated in the Sixth Amendment. Use of such statements at any point during the trial, including for impeachment, would constitute as much of a violation as use in the prosecution's case-in-chief.

The Assistance of Counsel Clause, along with the other rights enumerated in the Sixth Amendment, governs the conduct of criminal prosecutions, and does not concern police conduct. So an exclusionary rule that purports to only deter the police from obtaining statements from an uncounseled accused in the absence of a waiver does not further the interests of the Sixth Amendment. Instead, the violation of the Assistance of Counsel Clause occurs when the prosecution uses the uncounseled statements at trial. An exclusionary rule for such violations with an impeachment exception would encourage, not deter, the use of uncounseled statements at trial.

4. The petitioner argues that civil liability under 42 U.S.C. § 1983 would bolster the deterrent effect of an exclusionary rule that permitted impeachment use of uncounseled statements in violation of the Assistance of Counsel Clause. However, the prospect

of civil or ethical liability would provide little practical deterrent.

Prosecutors and police would face little prospect of civil or ethical liability for using informants to obtain uncounseled statements from an accused. A prosecutor and the police enjoy qualified immunity while conducting investigations. *Buckley* v. *Fitzsimmons*, 509 U.S. 259, 273 (1993). Qualified immunity protects them from liability except when their conduct violates clearly established statutory or constitutional rights. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). They typically instruct the informant not to elicit statements. The instructions to the informants shield the prosecutor and police from liability even when the informant disobeys them and deliberately elicits the desired statements. Similarly, prosecutors may not be ethically liable for their agents' misconduct under Model Rule 4.2. But the informant is still an agent for the prosecution when he disobeys those instructions, so the statements he elicits still implicate the Sixth Amendment if the prosecution uses them at trial. A prosecutor enjoys absolute immunity for performing the traditional functions of an advocate, such as presenting evidence at trial. *Imbler* v. *Pachtman*, 424 U.S. 409, 430-31 (1976). So a prosecutor would face no liability for actually using the uncounseled statements at trial.

5. There is no need to compromise the adversarial system by making uncounseled statements—especially those given to jailhouse informants—admissible for impeachment. A prior inconsistent statement is not necessarily indicative of perjury. Witnesses may be "impeached" on the stand without any finding of perjury, as such a finding requires not only false testimony but a willful intent to provide

false testimony. *United States* v. *Dunnigan*, 507 U.S. 87, 94 (1993). A witness in Respondent's position might, for example, "make up" stories about what he had done for self-protection reasons—so that he would be feared or (perversely) respected by other inmates. For this particular reason and others (including history and experience) the testimony of jail house informants is peculiarly unreliable. See Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63 (Praeger Publishers 2002).

Prior inconsistent statements may also result from anxiety, trauma, confusion, faulty memory, or mistake in recollection or perception. *Dunnigan*, 507 U.S. at 94. Evidence that a witness's in-court testimony differs from a previous statement does not necessarily mean the in-court statement was false—in many situations it would likely prove the opposite; namely, that the prior statement was the less accurate one. In all of these situations the lack of willful intent to falsify testimony would negate any claim of perjury. *Id.*

Even if Petitioner's proposed rule were rejected, Petitioner would still have ample tools to combat perjury that do not compromise the adversarial system. The Sixth Amendment right to counsel is "offense-specific." *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991). "Incriminating statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses." *Moulton*, 474 U.S. at 180 n.16. If the uncounseled statement provides such compelling evidence that an accused's testimony is perjurious, then the state may use it in a prosecution for perjury. Cf. *Portash*, 440 U.S. at 459. Scrupulously enforcing the Assistance of Counsel

Clause does not create a "right to commit perjury" any more than scrupulous enforcement of the Self-Incrimination Clause.

6. The Sixth Amendment ultimately resists the logic of an impeachment exception to the exclusionary rule. That logic rests on a balancing test between the benefits to the liberty interest protected and the social cost of excluding relevant evidence in the search for truth. *Nix*, 467 U.S. at 443-44. But the Sixth Amendment simply does not permit a balancing test between the rights designed to ensure a fair trial and the fairness of the trial. The Sixth Amendment commands "not that a trial be fair, but that... particular guarantee[s] of fairness be provided...." *Gonzalez-Lopez*, 548 U.S. at 146. Although the Sixth Amendment ensures a fair trial, it does not permit judges to impair Sixth Amendment rights by creating rules to make trials fairer. The Framers have already performed the balancing test the petitioner asks this Court to take. The Assistance of Counsel Clause is the result.

7. A rule of total exclusion is the logical and practical implication of the Sixth Amendment. The text of the Sixth Amendment implies that uncounseled statements are inadmissible at trial, even for impeachment purposes. The Sixth Amendment commands that an accused enjoy the assistance of counsel. No reasonable interpretation of the Sixth Amendment text would permit anything that would undermine that right. The use of uncounseled statements at trial, even for impeachment, undermines just that right.

The Framers understood the right to counsel as the right to assistance of a skilled and informed advocate in attacking the prosecution's evidence in an adversarial process. *An Historical Argument for the*

Right to Counsel During Police Interrogation, *supra*, at 1033-34. The Court has held that counsel's absence from a pretrial interrogation necessarily impairs counsel's ability to attack the uncounseled statements from the interrogation when the prosecution uses them at trial. *Wade*, 388 U.S. at 229-30. In essence, the violation of the right to counsel from the use of uncounseled statements at trial is the denial of counsel.

The remedy for the denial of counsel at a critical stage in the prosecution is a new proceeding with competent counsel provided at each critical stage. See, *e.g.*, *White* v. *Maryland*, 373 U.S. 59, 60 (1963) (per curiam). Of course, a court cannot "vacate" an unlawful interrogation. Cf. *Wade*, 388 U.S. at 240-42. But a court can accurately predict what the outcome of the interrogation would have been had it been conducted in conformity with the Assistance of Counsel Clause. The prosecution would not have obtained statements for use for any purpose.

II. THE IMPEACHMENT EXCEPTION PROPOSED BY PETITIONER SWEEPS TOO BROADLY.

Neither the Sixth Amendment nor the exclusionary rule permit an impeachment exception for statements taken in violation of the defendant's right to counsel. But, even if such an exception should be crafted, the one proposed by Petitioner goes much too far. It would, in practice, allow the prosecution to introduce a defendant's uncounseled admissions *whenever* the defendant testifies.

Any uncounseled admission made by a defendant to police prior to trial that is in any way inconsistent with the defendant's testimony can be characterized as "impeachment evidence." These admissions, if the

government seeks to use them, will always reflect negatively in some way on the defendant, whether because they challenge the defense version of events, appear inconsistent with an aspect of prior testimony, or simply suggest bias of some sort. See, *e.g.*, *United States* v. *Abel*, 469 U.S. 45, 49-53 (1984) (holding that evidence of bias is admissible as impeachment evidence). And, because the defendant's credibility is always at stake when he takes the stand, see Br. for the U.S. at 9, 27, such statements will always "impeach" the defendant. This will give prosecutors a powerful incentive to obtain these admissions and to press judges to allow them into evidence. As a result, Petitioner's "admissible for impeachment rule" will quickly morph into a tautological formula for the admissibility of jail-house informant testimony in each and every case where the defendant takes the stand, no matter how tangential or incidental such testimony may be.

Indeed, taken to its logical conclusion, Petitioner's rule would undoubtedly *encourage* violations of the right to counsel. The most opportune time to take a statement is before the accused has had an opportunity to speak with counsel, and police and prosecutors will surely take advantage of that opportunity. By merely holding such statements, the prosecutor can deter the defendant from taking the witness stand and may be able to force a favorable plea agreement. And, of course, should the defendant nevertheless exercise his or her right to testify, the prosecution can introduce the statements to secure a conviction. This result is hardly a mere "speculative possibility." *Harris*, 401 U.S. at 225. It is, rather, exactly what happened in this case: officers infringed the defendant's right to counsel by taking an uncounseled statement, and the prosecution later

compounded that infringement by introducing the statement at trial. If this conduct is upheld in this case, it will certainly be repeated in others.

These problems could be avoided through a more limited exception, admitting uncounseled statements only when necessary to prevent intentional false testimony. The primary concern raised in support of an impeachment exception is the possibility that, if the use of uncounseled statements is altogether foreclosed, defendants may feel free to perjure themselves on the stand without fear of challenge by the prosecution. But this problem can be addressed through a rule permitting introduction of these statements only when the prosecution can demonstrate, to the judge, that the defendant has in fact intentionally testified falsely. This standard will ensure that perjured statements do not go unchallenged and will deter defendants from testifying untruthfully in the first instance. As importantly, it will place some meaningful restrictions on the government's use of uncounseled statements, dissuading prosecutors and police from trying to obtain these statements in violation of the Sixth Amendment.

* * *

The Framers understood the right to counsel as the foundation of our adversarial system of justice. The integrity of the adversarial system is at stake in this case. The petitioner argues that it should be allowed to benefit from undermining that system. This would move our system of justice a step closer to an inquisitorial system, wherein the state seeks not to prove to the public whether the persons it has chosen to prosecute have committed the crimes of which the state accuses them, but whether they could be made

to confess their crimes. Without appropriate respect for individual rights, such a system would be rife with abuse. Given the appropriate procedural safeguards, such a system may prove reliable. But it would not be the system envisioned by the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Supreme Court of Kansas.

Respectfully submitted,

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December 19, 2008

REPLY BRIEF

No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. THE FUNDAMENTAL PURPOSE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS TO ENSURE A FAIR TRIAL THROUGH AN ADVERSARY PROCESS, WHICH OCCURRED IN THIS CASE.

A. Both parties and all amicus curiae in this case agree that the fundamental purpose of the Sixth Amendment right of a defendant "to have the Assistance of Counsel for his defence," U.S. CONST. amend. VI, is to ensure a fair trial through an adversary process. "[T]he core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Respondent received precisely such assistance and a fair trial.

First, counsel fully assisted Respondent in his defense in the adversary trial setting. Doser's testimony was offered only after Respondent testified that he did not shoot the murder victim. Joint Appendix ("J.A.") at 142–143. Respondent's counsel confronted and fully cross-examined Doser, exploring whether law enforcement officials, other inmates, or anyone else told Doser anything about Respondent's alleged crimes before Doser and Respondent were placed together, what instructions law enforcement agents gave to Doser, and whether Doser received any benefit in exchange for his assistance to law enforcement. *Id.* at 151–155.

Second, the trial judge, as is commonly done, gave the jury a cautionary instruction, directing them that "[y]ou should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence." J.A. at 30.

Finally, the ultimate proof that Respondent received a fair trial is in the result: the jury acquitted Respondent of the murder charge, the most serious charge to which Doser's testimony was relevant. By any objective measure, Respondent received a fair trial on the murder charge with "the Assistance of Counsel for his defence."

B.1. Respondent and his amicus seek a rule of total exclusion that would skew rather than promote fair trials. Only by ignoring (1) the fundamental goal of seeking the truth in criminal trials and (2) the risk of perjury by criminal defendants, can Respondent and his amicus argue for such a rule. The Court, in contrast, repeatedly has emphasized "the enormous social cost of excluding truth in the search for truth in the administration of justice," *Nix v. Williams*, 467 U.S. 431, 445 (1984), and that a "criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

The Court has applied a rule of total exclusion when constitutional text, in particular the Fifth Amendment prohibition against self-incrimination, compels such a result. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979). As a general

matter, however, in determining the scope of the exclusionary rule—irrespective of whether the case involves a Fourth Amendment, *Miranda*, or Sixth Amendment violation—the Court has engaged in a balancing analysis, weighing the costs of exclusion against its benefits. Furthermore, the Court consistently has concluded that such an analysis requires the exclusion of unlawfully obtained evidence from the government's case in chief, but not for impeachment purposes when a defendant testifies inconsistently with prior statements or other evidence.

Nothing in the Sixth Amendment or any other constitutional provision defines what it means "to have the assistance of counsel." The Court has held that, "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990). But the Court also has held that the right to counsel does not include a right to assistance in presenting perjured testimony, *Nix v. Whiteside*, 475 U.S. 157, 174–75 (1986), and that statements elicited in violation of the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), nonetheless may be used for impeachment if the defendant testifies inconsistently with his prior statements. *Harvey*, 494 U.S. at 351–52.

2. Importantly, unlike the Fifth Amendment prohibition against self-incrimination, nothing in the Sixth Amendment suggests that complete exclusion

of a defendant's voluntary statements made outside the presence of counsel is either necessary or proper to ensure a fair trial. To the contrary, in previous Sixth Amendment right to counsel cases, as well as in Fourth Amendment and *Miranda* cases, the Court *always* has engaged in a cost-benefit balancing analysis to determine the scope of the exclusionary rule. Apart from the extremely narrow set of cases involving compulsion or involuntary statements, the Court has *never* adopted a rule of total exclusion. Instead, the Court consistently has permitted the use of relevant, probative evidence to impeach a defendant who testifies in conflict with his own prior statements or other evidence against him.

The balancing analysis is by now familiar and well-established. The Court balances the benefits of exclusion (deterring future police misconduct) against the costs (*e.g.*, countenancing perjury, keeping the truth from the jury, setting the guilty free) to determine whether the exclusionary rule should apply and, if so, to what extent.

For Sixth Amendment purposes, the application of the cost-benefit balancing analysis is water already under the bridge, with the Court having engaged in precisely such an analysis in both *Michigan v. Harvey* and *Nix v. Williams*. *See* 494 U.S. at 350–53; 467 U.S. at 442–48. Further, in those cases the Court rejected a remedy of total exclusion, explaining that such a draconian rule "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the

administration of criminal justice." *Nix v. Williams*, 467 U.S. at 447.

In *Harvey*, the Court held that statements elicited in violation of the *Jackson* rule remain admissible for impeachment, even though the situation in *Harvey* presents far more potential for police misconduct than in the *Massiah v. United States*, 377 U.S. 201 (1964) context. In the *Jackson/Harvey* situation, the police directly initiate contact with the defendant and actively seek a waiver of the defendant's right to counsel. In that setting, there is at least the potential for police coercion or intimidation. That is not the case when an informant elicits statements from a defendant, as Respondent acknowledges when he argues that defendants "may be fooled" by informants into saying they committed a crime. Resp. Br. at 15. Respondent's invitation to adopt a rule of total exclusion here and jettison the cost-benefit balancing analysis is not justified by either constitutional text or precedent.

C. Finally, contrary to Respondent's suggestion, there are not significant reasons to distinguish *Massiah* violations from Fourth Amendment, *Miranda*, and *Jackson* violations. In all of the latter situations, the Court has applied the balancing analysis and held that improperly obtained evidence can be used for impeachment purposes if and when a defendant testifies inconsistently with his prior statements or other evidence against him.

Evidence obtained from Fourth Amendment, *Miranda*, and *Jackson* violations "functionally t[ies] counsel's hands before the parties even walk through

the courtroom doors," Resp. Br. at 18, just as much as a *Massiah* violation. Indeed, the similarities between the former violations, on the one hand, and a *Massiah* violation, on the other, are far greater than their differences. All of these violations involve the government obtaining evidence unlawfully. All of the evidence obtained through such violations can aid the government in obtaining a conviction. And all such evidence can make it more difficult for defense counsel to achieve a not guilty verdict or a lesser sentence.

Any differences between these violations are far less than Respondent claims. Certainly, *Miranda* and *Jackson* were decided with future trials in mind, and not for the purpose of protecting independent, exogenous constitutional interests such as the privacy rights that the Fourth Amendment protects. And, like the Fourth Amendment but unlike the Fifth Amendment, the Sixth Amendment's text does not dictate exclusion as a remedy for violations.

The Court's numerous cases permitting the use for impeachment purposes of evidence obtained in violation of *Miranda* and *Jackson*, as well as the Court's prior application of the balancing analysis in Sixth Amendment cases such as *Michigan v. Harvey* and *Nix v. Williams*, strongly supports Kansas in this case. The Court here should hold once again that "the interests safeguarded by the exclusionary rule . . . [are] outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone v. Powell*, 428 U.S. 465, 488 (1976).

II. THE COSTS OF EXCLUDING, FOR ALL PURPOSES, RELEVANT AND PROBATIVE VOLUNTARY STATEMENTS UNLAWFULLY OBTAINED FAR OUTWEIGH ANY MARGINAL BENEFIT IN DETERRING GOVERNMENT MISCONDUCT.

A. Significant Incentives Already Exist For Police And Prosecutors To Follow The Law.

Respondent and its amicus appear to endorse the propositions that no prosecutor is to be trusted and that all police seek to violate constitutional standards whenever doing so might result in obtaining evidence that may be useful in some way at some time. *See, e.g.*, Resp. Br. at 16; NACDL Amicus Br. at 20. The truth, however, is much more complicated than that, and there already exist several significant deterrents to police and prosecutorial misconduct.

1. First, as the Court has said in other contexts, such as describing the anticipated behavior of the States and state judges, there is a presumption that the States and their officials will act in good faith to follow and uphold the Constitution. *See, e.g., Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that" federal standards will be followed); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) ("we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). The Court has never

assumed, nor should it, that state prosecutors systematically and intentionally violate, or encourage police to violate, a defendant's constitutional rights.

Rather, the Court long has assumed that prosecutors follow the Constitution and the rules of professional ethics, and that ethical standards and professional discipline in particular will act as a significant deterrent to prosecutorial misconduct. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427, 429 (1976). Similarly, the Court recently recognized that police professional standards and discipline create important incentives for police to follow the law, much more so than when the Court first adopted the exclusionary rule decades ago. Combined with much stronger professional training and supervision than once may have been the case, police professional norms and discipline provide significant protection against police misconduct. *See Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006). Indeed, there is no evidence in this case of either prosecutorial or police bad faith or improper motives. Here, at worst, the informant failed to follow his instructions carefully.

2. As explained previously, there are strong incentives to follow the law in this context. Kansas Br. at 25. Because placing an informant in a cell to act as a "listening post" does not violate the Sixth Amendment right to counsel *at all*, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), any statements obtained from a defendant in that scenario will be admissible for *all* purposes. Having a defendant's inculpatory statements available for use in the government's case in chief is far more helpful than (1) purposefully

violating the *Massiah* rule (2) in the hope of obtaining something that might be useful (3) if and only if the defendant both (a) actually testifies at trial and (b) does so inconsistently with statements previously made to an informant.

3. There may be disagreement among the parties and amici in this case regarding the availability of a suit under 42 U.S.C. § 1983 for a *Massiah* violation. In its opening brief, Kansas asserted that Section 1983 might be invoked against police officers involved in a *Massiah* violation, as well as against a municipality if police or prosecutors were acting pursuant to an "official policy or custom" in committing *Massiah* violations. *See* Kansas Br. at 25–28.

Respondent and the United States appear to take the position that the Sixth Amendment is not violated until any statements obtained from the defendant in violation of *Massiah* actually *are introduced at trial.* U.S. Amicus Br. at 28 n.7; Resp. Br. at 21. That position suggests that police alone could never violate the Sixth Amendment right to counsel, though they might participate in such a violation.

It is unnecessary to decide the question of precisely when a Sixth Amendment violation occurs in order to resolve this case. If the violation is complete at the time police use an informant to deliberately elicit incriminating statements from a defendant, then the deterrence logic that justifies limiting the exclusionary rule to the government's case in chief with respect to Fourth Amendment and

Miranda violations is directly applicable here, because Section 1983 liability will be a deterrent to police misconduct. If, on the other hand, the violation is not complete until the elicited statements are introduced at trial, then the logic that supported limiting the exclusionary rule in *Michigan v. Harvey* is directly applicable. Either way, there is no justification in the Constitution or the Court's cases for treating a *Massiah* violation like the narrow and unique category of compelled or involuntary statements.

In any event, even if Section 1983 will not support a claim against police here, many other important deterrents indisputably exist, making a rule of total exclusion unnecessary as a deterrent measure. Such deterrents include the prohibition on using the defendant's statements in the government's case in chief, the existence of professional ethics rules and the prospect of professional discipline, and the threat of municipal liability even if prosecutorial misconduct is protected by absolute immunity (municipalities have no immunity in Section 1983 cases). Importantly, police and prosecutors have a strong incentive to follow the rule of *Kuhlmann* when utilizing informants because adherence to the law will permit the government to use a defendant's voluntary statements for all purposes, including in its case in chief, not just as impeachment.

B. Total Exclusion Of Informant Testimony Would Prevent The Jury From Hearing Often Relevant, Probative, And Reliable Evidence While Permitting Criminal Defendants To Commit Perjury.

Respondent's amicus, and to a great extent Respondent himself, suggest in essence that informants are inherently unreliable and that their uncorroborated testimony should be *per se* inadmissible, or else subject to special evidentiary and procedural rules. Such claims are radical, running contrary to two centuries of American (and even longer British) reliance upon cross-examination in an adversary process before a jury to determine the credibility of testimonial evidence in pursuit of the truth in criminal cases. *See, e.g.*, 5 J. Wigmore, *Evidence* § 1367 p.32 (J. Chadbourn rev. 1974) (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth").

Not surprisingly, the Constitution provides no basis for such special rules, and the Court long ago rejected any such proposition. Indeed, Sixth Amendment right to counsel cases such as *Massiah* and *Kuhlmann* stand in direct contradiction of the argument. In none of those cases did the Court even suggest, much less hold, that informant testimony is inherently unreliable. To the contrary, the Court long has recognized that such evidence is admissible, subject to the normal rules of evidence, cross-examination, and trial procedure.

In fact, informant testimony regarding voluntary statements a defendant has made to a person the

defendant believed (erroneously) to be a friend, ally, or confidante, may be extremely reliable. Furthermore, informants often have no prior knowledge of the crimes with which a defendant is charged, or the circumstances of those crimes, prior to talking with the defendant, making it impossible for them to fabricate the substance of a defendant's statements to match non-existent prior knowledge of the crime and its circumstances. In this case, Doser testified, on cross-examination, that the police did not tell him that Respondent was charged with murder, nor had he heard such information from other inmates, from visitors, or from any other source prior to his conversations with Respondent. J.A. at 151–152.

Further, there are reasons to think that statements made to informants may be even *more* reliable than statements elicited by direct police interrogation, where the possibility of coercion or intimidation may exist. Nonetheless, in *Michigan v. Harvey*, the Court held that statements obtained directly by the police in violation of the *Jackson* rule remain admissible for impeachment purposes. The logic and circumstances of *Harvey* effectively foreclose any argument for a different exclusionary rule for a *Massiah* violation, where there is not even a possibility of official coercion or intimidation because the defendant believes he is speaking to a friend or ally, and no threats of any kind have been or will be made.

Jailhouse informants themselves have incentives not to be aggressive or too active in questioning

cellmates. Jails can be dangerous places, and being discovered as a government informant could have significant, negative consequences, a fact of which Doser was well aware in this case. *See* J.A. at 155 ("I didn't want to push for any information. I didn't want to subject myself to being injured.") Thus, informants, too, have significant incentives to follow *Kuhlmann* rather than violate *Massiah*.

To the extent Respondent and his amicus argue that informants are inherently unreliable, they actually bolster the Court's longstanding concern about perjury by criminal defendants. By necessity, jailhouse informants themselves are criminal defendants. If such informants are inherently unreliable, logic suggests that criminal defendants as a group may be inherently unreliable. Certainly, it is not lost on juries (nor has it ever been lost on the Court) that criminal defendants may have incentives to be less than forthcoming or candid when they testify in their own defense. That is a basis for the Court's repeated warnings about condoning or encouraging perjury, and a fundamental reason for jury trials—to permit a cross-section of citizens to evaluate the credibility of *all* witnesses, including criminal defendants.

Moreover, it is common for trial judges to instruct the jury, as the trial judge did in this case, to evaluate an informant's testimony with caution, particularly when the informant has received a benefit from the government in exchange for testifying. There is no constitutional basis for

imposing additional restrictions or more severe and unique limitations on informant testimony.

III. THE ALTERNATIVE PROPOSALS THAT RESPONDENT AND HIS AMICUS OFFER ARE FUNDAMENTALLY FLAWED.

As an alternative to a rule of total exclusion, Respondent proposes that statements obtained in violation of the *Massiah* rule be admissible only "when necessary to prevent intentional false testimony." Resp. Br. at 26. His amicus offers a different alternative, namely that such a statement be admissible "only if it satisfies a basic reliability requirement: corroboration." NACDL Amicus Br. at 26. These "alternative" proposals are fundamentally flawed, run contrary to two centuries of American jurisprudence and, if adopted, would prove to be a "cure" with far worse consequences for the criminal justice system than any current perceived problems with informant testimony.

Respondent's alternative proposal effectively acknowledges that perjury by criminal defendants is a serious concern, and that impeachment of at least some criminal defendants who testify is critical to protecting the integrity of the criminal justice system. But even cursory consideration of the proposed alternative demonstrates that the only workable and constitutionally justified approach is to permit impeachment whenever a defendant testifies and the informant's testimony will contradict the defendant, just as the Court has held repeatedly in the Fourth Amendment, *Miranda*, and *Jackson* cases.

Fundamentally, the alternative proposals invite this Court to create special, unique rules on the basis of policy judgments, not constitutional requirements. There are two centuries of American jurisprudence in place to deal with informant testimony, as demonstrated by this case. Here, Respondent's counsel had information regarding any benefits Doser received from the government for his testimony, was able to cross-examine Doser aggressively on a variety of topics, and the trial judge gave the jury a cautionary instruction regarding informant testimony. These rules and measures protected Respondent's rights in this case, just as they long have been deemed adequate to protect criminal defendants' rights in general. Indeed, such measures proved quite effective here. Given the opportunity to assess Doser, the jury apparently did not believe him, at least not beyond a reasonable doubt, because it acquitted Respondent of murder, the primary charge Doser's testimony addressed.

Further, there is no constitutional "corroboration" requirement applicable to criminal defendants' testimony, though Respondent and his amicus must acknowledge that, by definition, informants placed in cells with defendants generally are themselves criminal defendants. Surely Respondent and his amicus are not intending to suggest that all criminal defendants are inherently unreliable and untrustworthy. If that is their suggestion, then any rule applied to informants logically should be extended also to criminal defendants generally. Because the right of a defendant to testify does not

include the right to commit perjury, the logic of the amicus alternative proposal is that the courts should require "corroboration" before a criminal defendant is permitted to testify.

Respondent and his amicus are inviting this Court to create unique new rules for informant testimony without any basis in constitutional text, history, or precedent. Equally important, it is not at all obvious that the alternatives are workable or would improve rather than undermine the criminal justice system. For example, under Respondent's proposal, would a trial court have to hold a mini-trial—putting the main trial on hold—to hear evidence to determine whether the defendant committed perjury during his trial testimony (in order to decide, under Respondent's alternative, whether the prosecution could then use the testimony of an informant to contradict the defendant's "perjury")? Would such a proceeding itself have to be conducted with a jury which, after all, is charged with determining the credibility of witnesses in our constitutional system? Moreover, by what standard of proof would the trial court have to determine that a defendant's testimony was perjurious? And would a finding that perjury had been committed be given collateral estoppel effect in a subsequent criminal prosecution for perjury? These questions are merely illustrative, and hardly exhaustive, of the many problems and complexities that Respondent's alternative proposal would create.

Similarly, adopting a "corroboration" alternative also would create complex and difficult questions.

Respondent's amicus necessarily cannot really answer questions such as what would constitute sufficient "corroboration" to justify the admission of informant testimony, or when and how a trial court would determine whether such corroboration existed. Indeed, Respondent's amicus acknowledges that existing corroboration policies have been created by state legislatures and prosecutor offices as a matter of policy, not by courts as a matter of constitutional law. *See* NACDL Amicus Br. at 26–27 (citing Texas law and Los Angeles District Attorney policy).

In recent years, particularly in the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases, the Court has emphasized the primary and fundamental role that juries play in determining the critical facts in criminal cases. Respondent and his amicus seek to create rules of law that limit the jury's ability both to hear witnesses and to evaluate fully the credibility of those witnesses. Furthermore, there is no suggestion in this case that the jury was somehow fooled or duped by the prosecution; indeed, it appears that the jury was skeptical of Doser's testimony because it in fact acquitted Respondent of the murder charge, the focus of Doser's testimony.

Ultimately, there is no reason to think that the traditional safeguards—among them disclosure of any benefits an informant receives from the government, an opportunity by defendant's counsel for vigorous cross-examination of an informant, cautionary jury instructions by the trial judge, and faith in a jury's ability to judge credibility—are insufficient to protect against untruthful informant

testimony. The Court need not and should not accept the invitation of Respondent and his amicus to substitute unproven policy judgments for settled jurisprudence.

IV. THIS CASE AND THE ISSUE PRESENTED ARE PROPERLY BEFORE THE COURT.

A. Respondent, as he did in his Opposition to the Petition for a Writ of Certiorari, at 9–12, raises the state law question whether he can be retried in the Kansas courts in the event this Court were to affirm the Kansas Supreme Court decision. Resp. Br. at 4, n.1. That question already has been answered in the State's favor by the state trial court, *see* Reply to Opposition to Petition for a Writ of Certiorari ("Reply to Opp."), at 1a–3a, presents only issues of Kansas law, and has no effect on the Court's jurisdiction to decide the Sixth Amendment issue.

The Court had before it the relevant information and authority regarding jurisdiction when the Court decided to grant Kansas's petition for a writ of certiorari, *see* Reply to Opp. 4–6, and the Court's grant, at a minimum, implicitly rejected Respondent's suggestion that his state law claim is relevant to the Court's jurisdiction. Kansas filed its timely petition for a writ of certiorari on April 28, 2008, well before the Kansas Speedy Trial Act clock would have run even under Respondent's erroneous view of Kansas law. The Court has jurisdiction.

Nor is there any question of mootness here. A decision in favor of Kansas will reinstate Respondent's convictions or, at a minimum, require further proceedings in the state courts to determine if

other grounds exist to preclude reinstatement. A decision in favor of Respondent will simply return the case to the trial court where Respondent can litigate the state law speedy trial act claim that he asserts precludes another trial (a claim which the trial court already has rejected). Either way, this Court's decision on the Sixth Amendment issue will matter.

B. Respondent also erroneously suggests that "Petitioner and its amici" are challenging Kansas' concession in the lower courts that a violation of Respondent's Sixth Amendment right to counsel occurred. Resp. Br. at 17, n.2. Kansas has not challenged the concession made in the state courts or the merits of the rule of *Massiah* v. *United States*, 377 U.S. 201 (1964). *See* Kansas Br. 18–19, n.* ("the prosecutors throughout the state courts assumed there was a violation, and Kansas does not challenge that assumption here"), 34 ("Kansas is not challenging [the *Massiah*] rule").

That said, a party's concessions do not make binding constitutional precedent. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (internal citations omitted); *see also Domino's Pizza, Inc.* v. *McDonald*, 546 U.S. 470, 478–79 (2006) (same). Kansas and the United States have simply pointed out that the State's concession below may have been ill-advised (relying as the prosecutors

apparently did upon Kansas precedent no longer valid in light of the Court's decision in *Kuhlmann*), a point also made by the Chief Justice of Kansas in her dissenting opinion below. *See* Pet. App. 35a–37a. It is neither necessary nor appropriate for the Court to revisit the State's concession now, and Kansas does not ask the Court to do so.

The facts of this case may well demonstrate the vagaries of, and difficulties in applying, the constitutional lines that the Court has drawn in *Massiah* and *Kuhlmann*, as well as the tension that may exist between cases such as *Kuhlmann* and *United States v. Henry*, 447 U.S. 264 (1980). Ultimately, however, it is unnecessary to consider whether the facts below establish a Sixth Amendment violation. Because Kansas has conceded the question both in the state courts and in this Court, the sole "issue here is remedy." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

* * * * *

At bottom, this case distills to one essential question: for exclusionary rule purposes, is there justification in constitutional text or the Court's cases for treating a *Massiah* violation differently than Fourth Amendment, *Miranda*, and *Jackson* violations? For the reasons set forth above and in Kansas's opening brief, the answer is "No."

Instead, this case should be resolved by applying the well-settled, cost-benefit balancing analysis that the Court consistently has relied upon in all exclusionary rule cases other than the narrow,

unique set involving compelled or involuntary statements. Here, the balance strongly favors limiting the scope of the exclusionary rule for *Massiah* violations to the government's case in chief. Precluding impeachment use of such evidence imposes too great a cost on the integrity of the judicial system by condoning perjury, a cost far in excess of any resulting marginal deterrent effect on official misconduct. For exclusionary rule purposes, a *Massiah* violation is in the same category as Fourth Amendment, *Miranda*, and *Jackson* violations.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-1356

In the Supreme Court of the United States

STATE OF KANSAS, PETITIONER

v.

DONNIE RAY VENTRIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a voluntary statement deliberately elicited from a criminal defendant in the absence of a valid waiver of the Sixth Amendment right to counsel may be used to impeach the defendant if he testifies at trial.

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BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether a voluntary statement obtained from a criminal defendant in the absence of a valid waiver of the Sixth Amendment right to counsel may be used to impeach the defendant at trial. Because the Sixth Amendment applies to the federal government as well as to the States (through the Fourteenth Amendment), resolution of the question presented will have substantial implications for the conduct of federal criminal investigations and trials. The United States therefore has a significant interest in the Court's disposition of this case.

STATEMENT

1. Early in the morning of January 7, 2004, respondent and his girlfriend, Rhonda Theel, went to the home

of local resident Ernest Hicks, ostensibly to confront him about rumors that he was abusing the children of his live-in girlfriend. Pet. App. 4a. Respondent and Theel were using methamphetamine and marijuana at the time, and neither had slept for days. *Ibid.* Theel verified that Hicks was home alone, then arranged for a friend to drive her and respondent to Hicks's home. *Ibid.*

Theel knocked on Hicks's front door, Hicks answered, and respondent and Theel went inside. Pet. App. 6a. One or both of them then shot Hicks with a .38 revolver and took his wallet and a cell phone. *Ibid.* They fled in Hicks's truck, then abandoned the truck and discarded the murder weapon. *Ibid.* They then walked to a convenience store and obtained a ride home. *Ibid.* They eventually were arrested and charged with several crimes in connection with the robbery and murder. *Ibid.*

While respondent was in jail awaiting trial, a state law enforcement officer arranged for another inmate in the jail, Johnny Doser, to be placed in the same cell as respondent. Pet. App. 8a. Doser was told that respondent "was under suspicion of some charges" and was instructed "[j]ust to keep [his] ear open and listen" for any incriminating statements. J.A. 146. On their second day together, Doser told respondent "that [he] could tell by the look in [respondent's] eyes that he had something more serious weighing in on his mind." J.A. 154. Respondent asked Doser if he could trust him, and Doser replied that he could. J.A. 149, 154. Respondent then told Doser that "him and his girlfriend, Rhonda, had went to rob somebody and that it went sour" and that "[h]e'd shot this man in his head and in his chest" and "took his keys, his wallet, about $350.00, and * * * a vehicle." J.A. 150. Doser reported those statements to the police. J.A. 150, 155.

2. Respondent's case proceeded to trial. Both he and Theel testified, presenting competing accounts of the events at Hicks's home. Pet. App. 6a-7a. According to Theel, when Hicks opened the front door, respondent rushed into the home, confronted Hicks with a gun, asked Hicks for money, and then shot Hicks in Hicks's bedroom. *Id.* at 7a. According to respondent, Theel entered Hicks's house first, confronted Hicks about the alleged child abuse, drew the gun, demanded money from Hicks, and then shot him. *Id.* at 7a-8a.

The prosecution sought to call Doser as a witness. Pet. App. 8a. Respondent objected, arguing that because the police placed Doser in his jail cell in order to obtain an incriminating statement, introducing that statement for any purpose would violate his Sixth Amendment right to counsel. J.A. 142-143. The prosecutor conceded that Doser "was placed in there and there's probably a violation," but argued that respondent's statement was admissible for impeachment purposes, because even if the police had obtained the statement illegally, "that doesn't give [respondent] * * * a license to just get on the stand and lie." J.A. 143. The trial court agreed and allowed Doser to testify. *Ibid.*

The jury convicted respondent of aggravated burglary and aggravated robbery, and the court sentenced him to 281 months of imprisonment. Pet. App. 9a; Pet. 4 n.*; J.A. 15-16. In a post-verdict motion, respondent renewed his contention that his jailhouse statement was not admissible at trial for any purpose. J.A. 31-35. The trial court again rejected the claim, holding that respondent's statement could be used for impeachment purposes at trial as long as it was given voluntarily. J.A. 161-162. The trial court then found, based on Doser's uncontroverted trial testimony, that respondent's statement to

Doser "was a complete, spontaneous, [and] voluntary statement." J.A. 162.

3. The Kansas Court of Appeals affirmed. Pet. App. 49a-64a. It noted the State's "conce[ssion] that through the use of an informant, it initiated a discussion with [respondent] in violation of his Sixth Amendment right to counsel." *Id.* at 57a. The court observed, however, that respondent "has never argued his statements were involuntary, nor would such an argument seem reasonable under the facts here." *Ibid.* The court then agreed with the majority of courts that have considered the issue that "statements taken in violation of the Sixth Amendment right to counsel (as opposed to the prophylactic rule) can be used for impeachment." *Id.* at 58a. To hold otherwise, the court explained, "would weaken the integrity of a trial as a truth-seeking process" by permitting a defendant to commit perjury without consequence. *Id.* at 59a.

4. The Kansas Supreme Court reversed. Pet. App. 1a-48a. Like the court of appeals, it accepted the State's concession that the police failed to respect respondent's right to counsel when they placed Doser in a cell with him "as a human listening device." *Id.* at 10a.[1] But unlike the court of appeals, it concluded that the effect of that violation was to render respondent's statements inadmissible at trial for *any* purpose. *Id.* at 20a-21a.

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[1] In accepting the State's concession, both the court of appeals (Pet. App. 57a) and the state supreme court (*id.* at 10a, 20a-21a) cited *State* v. *McCorgary*, 543 P.2d 952, 956-958 (Kan. 1975), cert. denied, 429 U.S. 867 (1976), which held that the State contravenes the Sixth Amendment when it places an informant in the defendant's jail cell to report on his statements, even if the informant does not take any active steps to elicit them. *McCorgary* is of questionable vitality in light of this Court's decision in *Kuhlmann* v. *Wilson*, 477 U.S. 436, 459 (1986). See Pet. App. 35a (McFarland, C.J., dissenting).

The state supreme court observed that this Court has permitted the use of physical evidence obtained in violation of the Fourth Amendment, as well as statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and *Michigan* v. *Jackson*, 475 U.S. 625 (1986), for impeachment purposes when a defendant testifies at trial. Pet. App. 10a-15a (citing *Walder* v. *United States*, 347 U.S. 62 (1954), *Harris* v. *New York*, 401 U.S. 222 (1971), *Oregon* v. *Hass*, 420 U.S. 714 (1975), and *Michigan* v. *Harvey*, 494 U.S. 344 (1990)). The court observed that, in each of those cases, this Court concluded that the "truth-seeking function" of a criminal trial outweighed the deterrence that would be achieved by excluding the evidence for all purposes. *Id.* at 11a-14a.

But rather than weigh the societal costs and deterrence benefits of excluding statements like respondent's for all purposes at trial, the state supreme court simply adopted a per se rule of exclusion. Pet. App. 19a-20a. It explained that "in *Harris*, *Hass*, and *Harvey*, the defendant dealt directly with law enforcement officers," whereas "the statements at issue in this case were made to a jailhouse informant." *Id.* at 15a. That fact is "significant," in the court's view, because the surreptitious nature of the questioning made it impossible for the police to obtain a knowing and voluntary waiver of the right to counsel from respondent. *Id.* at 15a, 19a-20a. And "[w]ithout a knowing and voluntary waiver of the right to counsel," the court concluded, "the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State agent violates the defendant's Sixth Amendment rights." *Id.* at 20a-21a. In so holding, the court rejected the State's argument that it could use respondent's statements to impeach him so long as they were voluntary. *Id.* at 21a.

Chief Justice McFarland dissented. Pet. App. 27a-48a.[2] She noted that this Court "has repeatedly and consistently allowed the admission of evidence and statements otherwise inadmissible in the prosecution's case in chief to be used for purposes of impeachment" except where the statement "was obtained by coercion or was otherwise involuntary," because "the deterrence policy supporting exclusion is outweighed by the importance of impeachment to the proper functioning of the truth-finding process." *Id.* at 27a.

After weighing those interests in this case, Chief Justice McFarland concluded that respondent's statements to Doser were properly admitted at trial. Pet. App. 44a-48a. In her view, the majority's "per se rule of exclusion" placed undue weight on "the surreptitious nature of the police conduct," *id.* at 28a-37a; improperly treated the lack of a waiver of the right to counsel as dispositive, *id.* at 37a-40a; and failed to account for the fact that respondent's statements were made voluntarily, *id.* at 40a-43a. Further, she cautioned that the majority's rule "expands exclusion jurisprudence beyond the limits of that ever recognized by the Supreme Court" and "seriously undermines the truth finding process of the adversary system." *Id.* at 47a-48a.

SUMMARY OF ARGUMENT

The Sixth Amendment permits the use of voluntary statements deliberately elicited from a criminal defendant in the absence of counsel for the limited purpose of impeaching the defendant once he testifies at trial.

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[2] As an initial matter, Chief Justice McFarland observed that "there is a legitimate issue" regarding whether the State even acted illegally in placing Doser in respondent's jail cell. Pet. App. 35a-37a; see note 5, *infra*.

A. This Court has permitted the introduction of illegally obtained evidence to impeach a testifying defendant in a number of circumstances. For example, the Court has long recognized that evidence obtained in violation of the Fourth Amendment's prohibition on unreasonable searches and seizures need not be excluded for all purposes at trial, because exclusion in the government's case in chief is sufficient to remedy the constitutional violation. The Court came to the same conclusion in the context of the Fifth Amendment, where it held that statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), while not admissible as affirmative evidence, could be used for impeachment. And the Court applied the same principles in the Sixth Amendment context in *Michigan* v. *Harvey*, 494 U.S. 344 (1990), where the Court determined that statements police elicited from a criminal defendant whose waiver of the right to counsel was invalid under *Michigan* v. *Jackson*, 475 U.S. 625 (1986), are admissible at trial for impeachment.

In each of those situations, the Court excluded the evidence from the government's case in chief and then weighed the benefits of prohibiting the use of the evidence for impeachment of a testifying defendant against the substantial societal costs of exclusion. Because only marginal benefits would be achieved by completely excluding material, probative evidence, at the great cost of permitting criminal defendants to commit perjury without being confronted with their prior inconsistent statements, the Court struck the balance in favor of admission for impeachment purposes.

B. Whether statements deliberately elicited from a criminal defendant in violation of Sixth Amendment standards are admissible for impeachment purposes depends on weighing the costs of exclusion against its benefits.

The core purpose of the Sixth Amendment right to counsel is to ensure a fair trial through an adversary process. To achieve that purpose, this Court has extended the right to counsel to certain critical pre-trial stages. In particular, the Court has held that, once formal criminal proceedings have begun, the Sixth Amendment prohibits the prosecution from using as substantive evidence statements deliberately elicited from a defendant unless the defendant has validly waived his right to counsel. When evidence is elicited in that manner, the Court excludes the evidence from the government's case in chief because, if statements could be gathered before trial in circumvention of the right to counsel, the value of the right to have counsel at trial would be seriously diminished.

It does not follow, however, that statements deliberately elicited from a criminal defendant in the absence of a valid waiver of counsel are inadmissible at trial for all purposes. The Sixth Amendment does not, by its text, prohibit the introduction of certain evidence; instead, it leaves to the courts the question of how to enforce the guarantee of the assistance of counsel. Accordingly, this Court has tailored Sixth Amendment remedies to the injury suffered and has accounted for competing interests.

In *Harvey*, this Court determined that the statements at issue could be used to impeach the defendant after balancing the benefits of exclusion against its costs. That balancing of costs and benefits is applicable to the question presented here as well. Although *Harvey* considered a violation of a "prophylactic" Sixth Amendment rule that invalidated a waiver, and this case involves no waiver at all, both the prophylactic protection at issue there and the prohibition on use of statements deliberately elicited from an uncounseled defendant reflect constitutional

rulings, and in both cases, the Constitution does not require exclusion but leaves it to the courts to determine whether the statements may be used for impeachment.

C. In this case, as in each of the other Fourth, Fifth, and Sixth Amendment cases where this Court has considered the question, the costs that excluding the defendant's material, probative statements would impose on the truth-seeking function of criminal trials significantly outweigh any benefits.

The costs of precluding impeachment with voluntary, deliberately elicited statements would be substantial. The criminal trial process is a search for the truth, and excluding a defendant's prior statements from his trial would greatly impede the jury's ability to find the truth. Although a criminal defendant has a right to testify, he does not have a right to testify falsely. Yet a prohibition on impeachment use of deliberately elicited statements would permit a criminal defendant to take the stand and lie without fear of confrontation with his own prior conflicting statements. Moreover, there is nothing unfair about permitting the use of deliberately elicited statements for impeachment, because the government is only able to use those statements once the defendant decides to testify and does so inconsistently with his prior statements.

In contrast, the purposes of the Sixth Amendment right to counsel would not be furthered by prohibiting use of voluntary, deliberately elicited statements for impeachment. Indeed, prohibiting the prosecution from using such statements would hinder the goal of a fair trial that the right to counsel is designed to protect. When a defendant takes the stand, he puts his credibility in issue, and keeping probative, reliable evidence from the jury would make it difficult for the jury to evaluate

credibility, thus impairing the fairness of the trial. Moreover, a bar on impeachment cannot be justified on the theory that incremental deterrence is warranted. The government already cannot use the statements to prove its own case. And police officers have significant disincentives to disregard a suspect's right to counsel, including possible suppression of fruits, the increasing professionalism of the police force, and the possibility of internal discipline.

In the context of statements deliberately elicited from an uncounseled criminal defendant, therefore, the costs of making the statements unavailable for impeachment greatly outweigh any benefits to the protection of the right to counsel. In this case, then, the trial court properly admitted respondent's statements for impeachment.

ARGUMENT

A VOLUNTARY OUT-OF-COURT STATEMENT DELIBERATELY ELICITED IN THE ABSENCE OF A VALID WAIVER OF THE RIGHT TO COUNSEL IS ADMISSIBLE TO IMPEACH A CRIMINAL DEFENDANT WHO TESTIFIES AT TRIAL

While respondent was awaiting trial in this case, law enforcement officials placed an informant in his jail cell to listen for any incriminating statements he might make. The State conceded that the informant deliberately elicited statements from respondent in violation of Sixth Amendment standards, and it did not seek to use those statements in its case in chief at trial. Respondent then took the stand and testified in a manner that directly conflicted with what he had told the informant. The question presented is whether the Sixth Amendment permitted the prosecution to use respondent's statements to impeach his credibility. The answer is yes.

A. This Court Has, In Numerous Contexts, Permitted Evidence Improperly Obtained From A Criminal Defendant To Be Used For Impeachment Purposes

The Fourth, Fifth, and Sixth Amendments provide a variety of limitations on the government's ability to collect and use evidence from a criminal defendant to prove the government's case. But the Court has not required that the evidence be excluded for all purposes. In particular, when a defendant testifies, the Court has permitted the evidence to be used for the limited purpose of impeachment, so long as the evidence was not obtained through coercion or compulsion.

1. This Court has long held that evidence obtained in violation of the Fourth Amendment may be used to impeach a defendant's testimony at trial. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court determined that the Fourth Amendment exclusionary rule should not be extended to bar the use of illegally seized evidence for impeachment. The Court explained that the consequence of an illegal search is exclusion of the evidence from the government's case in chief. *Id.* at 64-65 (the government cannot "use the fruits of such unlawful conduct to secure a conviction"). But, the Court continued, the fact of the violation does not require the evidence to be excluded for all purposes: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained," but "[i]t is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Id.* at 65. That, in the Court's view, "would be a perversion of the Fourth Amendment." *Ibid.*

The Court came to the same conclusion in *United States* v. *Havens*, 446 U.S. 620 (1980), where it permitted the use of illegally seized drugs in rebuttal in order to impeach the defendant's testimony that he had not been involved in drug smuggling. *Id.* at 622. The Court again weighed the deterrence value of excluding the evidence against the costs of permitting the defendant's testimony to go unchecked. It determined that the need to deter police illegality is served "by denying the government the use of the challenged evidence to make out its case in chief," and that the "incremental furthering" of that goal that might be achieved by prohibiting the use of the evidence for impeachment is outweighed by the costs of such a rule. *Id.* at 627. The Court explained that "arriving at the truth is a fundamental goal of our legal system," *id.* at 626, and that goal would be substantially impaired by permitting a criminal defendant's "false testimony [to] go unchallenged," *id.* at 627.

2. This Court employed the same analysis, and came to the same conclusion, with respect to evidence obtained in violation of the Fifth Amendment protections afforded by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In *Harris* v. *New York*, 401 U.S. 222 (1971), the Court concluded that statements a defendant made immediately following his arrest, but before he was given the warnings required by *Miranda*, could be used for impeachment purposes at trial. *Id.* at 223-226. Although "*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel," the Court explained, "[i]t does not follow" that evidence obtained "is barred for all purposes." *Id.* at 224. Instead, the Court weighed the deterrence benefits and societal costs of completely excluding the statements. It determined that "[t]he impeach-

ment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," and "the benefits of this process should not be lost * * * because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Id.* at 225. And it concluded that admission of the statements for impeachment was justified so that "[t]he shield provided by *Miranda*" is not "perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

The same principles guided the Court in *Oregon* v. *Hass*, 420 U.S. 714 (1975), where it permitted the impeachment use of statements that a criminal defendant made to police after receiving *Miranda* warnings and requesting counsel. "As in *Harris*," the Court explained, the violation of *Miranda* rendered the illegally obtained evidence unavailable in the government's case in chief, but it did not mean the evidence "is barred for all purposes." *Id.* at 722. Barring the evidence for impeachment, the Court concluded, "would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth." *Id.* at 723.

3. The same approach has governed under the Sixth Amendment. In *Michigan* v. *Harvey*, 494 U.S. 344 (1990), the Court held that statements taken from a defendant in police-initiated interrogation, after the defendant was charged and counsel was appointed for him, violated the rule in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), but the Court concluded that the defendant's statements made after a knowing and voluntary waiver of the right to counsel were admissible to impeach his trial testimony. "[O]nce formal criminal proceedings begin," the Court explained, "the Sixth Amendment ren-

ders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." 494 U.S. at 348 (internal quotation marks omitted). Under *Jackson*, the Court added, even an express waiver of the right to counsel is "presumed invalid"—and the evidence therefore unavailable in the government's case in chief—when, after the defendant "requests assistance of counsel," police initiate the discussion. *Id.* at 349-350.

Relying on its decisions in *Harris* and *Hass*, however, the Court held that the costs of precluding impeachment with such evidence outweighed the deterrence benefits of such a rule: "[T]he search for truth in a criminal case outweighs the speculative possibility that exclusion of evidence might deter future violations." 494 U.S. at 351-352 (internal quotation marks omitted). In particular, the Court observed, "[i]f a defendant exercises his right to testify on his own behalf, he assumes a reciprocal obligation to speak truthfully and accurately," and he should not be allowed to use the fact of the government's improper action to "provide himself with a shield against contradiction of his untruths." *Id.* at 351 (quoting *Harris*, 401 U.S. at 225).

4. This Court's decisions in *Walder*, *Havens*, *Harris*, *Hass*, and *Harvey* reflect the general principle that the rules that constrain the government in its direct case do not necessarily apply to matters of rebuttal and impeachment. That is because of the reality that, when a defendant becomes a witness, the paramount interest in preventing the distortion of the fact-finding process generally dictates that the jury be afforded the opportunity to hear evidence that may cast doubt upon the credibility of his testimony. Particularly in light of the great costs it exacts on the truth-seeking function of a criminal trial,

complete exclusion of the improperly obtained evidence has not generally been deemed warranted or necessary to protect the underlying constitutional rights at stake.[3]

B. The Admissibility For Impeachment Of Voluntary Statements Deliberately Elicited In Violation Of Sixth Amendment Standards Turns On A Balance Of The Costs Of Exclusion Against Its Benefits

1. The Sixth Amendment provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. As this Court has repeatedly noted, "the core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)).

The Sixth Amendment guarantee of counsel exists "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Cronic*,

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[3] In a number of other cases, this Court has implicitly struck the same balance, permitting the government to use evidence for impeachment purposes even if the government would not be permitted to use the same evidence affirmatively. See, *e.g.*, *Tennessee* v. *Street*, 471 U.S. 409, 413-416 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), to correct a potentially misleading impression created by the defendant's testimony); *Jenkins* v. *Anderson*, 447 U.S. 231, 235-238 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story before his arrest); *Doyle* v. *Ohio*, 426 U.S. 610, 619 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if the defendant testifies that he did tell that story to the police after his arrest).

466 U.S. at 658. The "fair trial" that the right to counsel seeks to ensure is a trial in which "a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984). Thus, the Sixth Amendment guarantees the right to counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

2. In order to protect the adversary process leading to criminal punishment, the Court has extended the right to the assistance of counsel to "certain critical pretrial proceedings," in which "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984) (internal quotation marks omitted; brackets in original). The purpose of the extension is to provide the assistance of counsel in situations "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade*, 388 U.S. 218, 224 (1967).

In a line of cases beginning with *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court has held that, once formal criminal proceedings have begun, the Sixth Amendment "renders inadmissible in the prosecution's case in chief statements 'deliberately elicited' from a defendant," unless the defendant has voluntarily, knowingly, and intelligently waived the right to counsel. *Harvey*, 494 U.S. at 348-349; see *Fellers* v. *United States*, 540 U.S. 519, 523-524 (2004); *Kuhlmann* v. *Wilson*, 477 U.S. 436, 457 (1986); *Maine* v. *Moulton*, 474 U.S. 159, 172-173 (1985); *United States* v. *Henry*, 447 U.S. 264, 270 (1980); *Brewer* v. *Williams*, 430 U.S. 387, 400-401 (1977). That rule rests on the view that the introduction at trial of such statements undermines the ability of counsel to ren-

der assistance that contributes to a fair trial. See *Harvey*, 494 U.S. at 348.

Statements may be "deliberately elicited" in violation of Sixth Amendment standards by government informants acting undercover or by law enforcement officials in overt encounters with the defendant.[4] For a defendant to establish a violation in the acquisition of statements obtained by a jailhouse informant, he must show that "the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann*, 477 U.S. at 459. "[S]imply * * * showing that an informant, either through prior arrangement or voluntarily, reported [the defendant's] incriminating statements to the police" is not enough. *Ibid.* But an informant's seeking out information through questioning may create Sixth Amendment issues.[5]

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[4] The post-charge deliberate elicitation of statements without the defendant's counsel or a valid waiver of counsel is not intrinsically unlawful, nor must evidence of such statements be excluded from *uncharged* cases. The Sixth Amendment is "offense specific," *McNeil* v. *Wisconsin*, 501 U.S. 171, 175 (1991), and "[t]he police have an interest . . . in investigating new or additional crimes [after an individual is formally charged with one crime]." *Id.* at 175-176 (quoting *Moulton*, 474 U.S. at 179-180 (punctuation altered)). Thus, the police often act entirely properly in acquiring statements pertaining to such new crimes, even if the statements are also incriminating on charged crimes, and the Sixth Amendment does not bar use of those statements in a trial on those new offenses. *Id.* at 176.

[5] In light of those standards, the record in this case suggests that the State did not deliberately elicit respondent's statements. See Pet. App. 35a-37a (McFarland, C.J., dissenting). Doser testified without contradiction that he was told "[j]ust to keep [his] ear open and listen," J.A. 146, and that he did not "push" respondent "for any information" and "didn't ask anything that wasn't volunteered." J.A. 155. Doser did at one point say to respondent "that [he] could tell by the look in [respon-

3. When statements are deliberately elicited from a criminal defendant in the absence of counsel or a valid waiver of the right to counsel, the Court has determined that the statements must be excluded from the government's case in chief at trial. The theory behind the exclusion is that, if the government could gather evidence from the defendant before trial through circumvention of the defendant's right to counsel, the availability of counsel at the trial itself would be an illusory protection. The exclusion of statements obtained in the absence of a valid waiver of counsel is thus thought to further the fundamental goal of the right to counsel, which is to protect "the integrity or fairness of [the] criminal trial." *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

It does not follow, however, that statements obtained in violation of Sixth Amendment standards are unavailable to impeach a criminal defendant once he testifies at trial. The Sixth Amendment right to counsel is not a textual prohibition against the introduction of evidence at trial. Instead, it requires that counsel must be afforded to the accused, and it leaves to the courts the question of the appropriate means of enforcing that guarantee. In that respect, the Sixth Amendment is like the Fourth

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dent's] eyes that he had something more serious weighing in on his mind." J.A. 154. But that statement is roughly equivalent to the statement of the informant in *Kuhlmann* that the defendant's explanation of his role in the charged offenses "didn't sound too good"—a statement that did not convert the informant's interactions with the defendant into deliberate elicitation. 477 U.S. at 460-461. Thus, while the question is not presented by this case because the State "does not challenge the concession below that there was a Sixth Amendment right to counsel violation," Pet. Br. 18-19 & n.*, the better view appears to be that Doser did not function as anything other than a permissible listening post, and accordingly, there was no threshold violation of Sixth Amendment standards. See Pet. App. 35a-37a (McFarland, C.J., dissenting).

Amendment, which prohibits unreasonable searches and seizures, but does not explicitly provide a remedy for its violation. U.S. Const. Amend. IV. Just as this Court has fashioned the exclusionary rule "as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights," *Arizona* v. *Evans*, 514 U.S. 1, 10 (1995), so it has balanced the costs and benefits of the exclusion of evidence in the Sixth Amendment context as well. See *Nix* v. *Williams*, 467 U.S. at 442-448. The impeachment use of evidence obtained in violation of the Sixth Amendment, like that obtained in violation of the Fourth Amendment, does not violate the express terms of any constitutional provision, but simply brings into question whether to apply a court-made exclusionary rule.

4. As a general matter, the Court has explained, remedies for Sixth Amendment violations "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *United States* v. *Morrison*, 449 U.S. 361, 364 (1981), such as "the public interest in having the guilty brought to book," *id.* at 366 n.3 (quoting *United States* v. *Blue*, 384 U.S. 251, 255 (1966)). The Court has thus "tailor[ed] relief appropriate in the circumstances to assure the defendant the effective assistance of counsel and a fair trial." *Id.* at 365. When Sixth Amendment standards are violated, normally "[t]he remedy * * * is limited to denying the prosecution the fruits of its transgression." *Id.* at 366. The remedy does not extend, however, to exclusion for all purposes, because that "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the administration of criminal justice." *Nix* v. *Williams*, 467 U.S. at 447.

Just as in *Michigan* v. *Harvey*, *supra*, where this Court permitted impeachment with statements taken in violation of *Michigan* v. *Jackson*, *supra*, the Sixth Amendment does not mandate complete exclusion of respondent's statements here. *Harvey* concerned a violation of the "prophylactic" rule announced in *Jackson*, 494 U.S. at 353, where the defendant waived his right to counsel but the waiver was invalid because it occurred in police-initiated questioning. The Court left open "the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." *Id.* at 354. But the same analysis applies in both contexts. While the rule at issue in *Jackson* may be described as "prophylactic," this Court has made clear in the Fifth Amendment context that rules described as "prophylactic" may be constitutional in nature. See *Dickerson* v. *United States*, 530 U.S. 428, 437-441 (2000) (explaining that, while the requirements of *Miranda* v. *Arizona*, *supra*, have been referred to as "prophylactic," *Miranda* is "constitutionally based"). Similarly, this Court's interpretations of the Sixth Amendment, whether they involve preclusion of the use of statements deliberately elicited without any waiver of counsel (*Massiah*) or preclusion of the use of statements obtained in police-initiated interrogation despite a waiver of counsel (*Jackson*), reflect constitutional rulings. In both contexts, the Sixth Amendment does not, by its terms, require the exclusion of certain evidence at trial. Rather, the determination whether to bar the use of evidence turns on the purposes that would be served by exclusion, balanced against its costs.[6]

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[6] The distinction between prophylactic rules and underlying rights can lead to different results under the Fifth Amendment, where the

In this respect, the Sixth Amendment differs from the Fifth Amendment. Only the Fifth Amendment prohibits the admission of certain evidence by its text. See U.S. Const. Amend. V (prohibiting a defendant from being "compelled * * * to be a witness against himself"). The Court has accordingly held that evidence that is compelled in violation of the Fifth Amendment is inadmissible for any purpose. See, *e.g.*, *New Jersey* v. *Portash*, 440 U.S. 450, 458-459 (1979) (any use at trial of grand jury testimony compelled under a grant of immunity would violate the Fifth Amendment prohibition against compelled self-incrimination). The Court has similarly held that evidence that is coerced in violation of the Due Process Clause may not be used for any purpose. See *Mincey* v. *Arizona*, 437 U.S. 385, 398-399 (1978) ("*any* criminal trial use" of statements coerced from a seriously wounded criminal defendant would violate the Due Process Clause). In the case of a coerced confession, the balancing of costs and benefits always favors exclusion of the evidence, because coerced confessions are generally thought inherently unreliable, see, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 385-386 (1964), and strong interests support deterring coercive police practices, see, *e.g.*,

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constitutional text explicitly excludes "compelled" statements. See pp. 21-22, *infra*. But that distinction does not necessarily lead to different results under the Sixth Amendment, where the constitutional text does not speak to exclusion. The *Jackson* and *Massiah* rules share a common purpose: safeguarding the right to the assistance of counsel at trial. In each case, the goal is to prevent the government from exploiting uncounseled encounters, after the right to counsel has attached, in order to obtain statements to prove its case. But in both contexts, these rules are subject to limitations to prevent defendants from undermining the truth-seeking process—as would transpire if defendants could testify without impeachment with their own prior, inconsistent voluntary statements.

Blackburn v. *Alabama*, 361 U.S. 199, 206-207 (1960). Those reasons do not apply to deliberately elicited statements from an uncounseled defendant: statements may be deliberately elicited without any coercion, and the probative value of the defendant's own voluntary statements is generally quite high. Here, for example, a defendant's jailhouse statements made to a trusted informant may be entirely free of coercive influence, entirely voluntary, and highly reliable.

5. The Kansas Supreme Court's proffered reasons also do not justify a per se rule of exclusion. The state supreme court believed that complete exclusion is required unless the defendant has voluntarily, knowingly, and intelligently waived the right to counsel. Pet. App. 19a-21a. But the absence of a valid waiver affects whether the defendant's statements were obtained in contravention of Sixth Amendment standards; it does not answer the separate question whether those statements are inadmissible for all purposes. See *Harvey*, 494 U.S. at 351; Pet. App. 37a-39a (McFarland, C.J., dissenting). That question is answered by weighing the costs and benefits of exclusion, except where the constitutional right itself guarantees the exclusion of evidence. The state supreme court also suggested that complete exclusion was warranted because respondent's statements were obtained surreptitiously. Pet. App. 19a-22a. But the Sixth Amendment right to counsel does not prohibit the use of undercover investigative techniques; it protects a represented defendant against the use of statements deliberately elicited, whether the elicitor is an undercover operative or a uniformed law enforcement official. *Kuhlmann*, 477 U.S. at 458. In both contexts, the Sixth Amendment is implicated because of the government's interaction with the accused without the adversarial

protections afforded by counsel. And the remedial question must be answered by determining whether the underlying purposes of the adversarial system that the Counsel guarantee protects necessitate excluding evidence, even at a high cost to the trial's ability to ferret out the truth.

C. The Costs Of Precluding Impeachment With Voluntary But Uncounseled Statements Substantially Outweigh Any Benefits

Because the Sixth Amendment does not mandate the exclusion of the statements at issue here for all purposes, the appropriate inquiry is whether the costs that excluding respondent's statements would impose on the truth-seeking function of the criminal trial are outweighed by any benefits. Here, as in each of the other Fourth, Fifth, and Sixth Amendment cases where the Court has considered that question, that weighing strongly favors admission of the statements for impeachment.

1. The costs of precluding impeachment with voluntary, deliberately elicited statements would be great. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); accord *Havens*, 446 U.S. at 626; *Stone* v. *Powell*, 428 U.S. 465, 490 (1976). Society has a weighty public interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). Thus, as this Court has observed repeatedly, a constitutional violation warrants the exclusion of evidence only if the benefits from exclusion are worth "the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix* v. *Williams*, 467 U.S. at 445; see *Hudson* v. *Michi-*

gan, 547 U.S. 586, 591 (2006); *Pennsylvania Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 363 (1998); *Oregon* v. *Elstad*, 470 U.S. 298, 312 (1985); *Solem* v. *Stumes*, 465 U.S. 638, 650 (1984); *Havens*, 446 U.S. at 626-628; *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 224-226; *Alderman*, 394 U.S. at 174-175.

The societal cost of excluding evidence is particularly great when the evidence is intended to aid the jury in assessing the credibility of a defendant's testimony. In that setting, the general interest in promoting accurate factfinding is enhanced by the special need to guard against perjury. This Court has long recognized that a defendant's right to testify in his own defense includes the obligation to testify truthfully. *Harvey*, 494 U.S. 351; *Havens*, 446 U.S. at 626; *Hass*, 420 U.S. at 723; *Harris*, 401 U.S. at 225; *Walder*, 347 U.S. at 65. The introduction of evidence for impeachment enforces that obligation by allowing the contradiction of "seemingly false statements" that the defendant makes on the stand. *Havens*, 446 U.S. at 627. The right to assistance of counsel, which exists "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution," *Wade*, 388 U.S. at 227, does not justify barring the prosecution from using the "traditional truth-testing devices of the adversary process," *Harris*, 401 U.S. at 225, to root out perjury. When a defendant makes false statements on the witness stand, he jeopardizes the "ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685.

The use of prior inconsistent statements is one of the most effective techniques available to the advocate to expose perjury. See *Havens*, 446 U.S. at 627. The admissibility of prior inconsistent statements for impeachment no doubt prevents much perjured testimony from

ever being offered, by dissuading witnesses who would otherwise be tempted to fabricate or shade their testimony.

A defendant has no valid interest in avoiding impeachment with probative evidence that might expose perjury. Although "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so," "that privilege cannot be construed to include the right to commit perjury." *Harris*, 401 U.S. at 225; see *Nix* v. *Whiteside*, 475 U.S. 157, 174-175 (1986) (trial counsel may not assist his client in presenting perjured testimony). As this Court noted many years ago, the advantages that a defendant enjoys in a criminal case must be "counterweighted with * * * conditions to keep the advantage from becoming an unfair and unreasonable one"; "[t]he price a defendant must pay for attempting to prove [a fact] * * * is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson* v. *United States*, 335 U.S. 469, 479 (1948); see *Havens*, 446 U.S. at 626-627 ("It is essential * * * to the proper functioning of the adversary system that when a defendant takes the stand, the government must be permitted proper and effective cross-examination in an attempt to elicit the truth.").

The defendant has substantial control over the ability of the prosecution to make use of pre-trial statements for impeachment. The prosecution can offer such prior statements only after the defendant, with the assistance of counsel, makes a voluntary decision to testify. Moreover, impeachment is permissible only if the defendant gives testimony that contradicts his previous statements. In addition, the defendant has the ability to explain the circumstances under which he made the impeaching

statements, and defense counsel can ensure that defendant's explanation of any inconsistency is fully aired. Presumably, the jury will be able to recognize honest inconsistencies and appropriately discount the prosecution's reliance on minor discrepancies among the defendant's statements. There would thus be substantial societal costs to making reliable, probative evidence unavailable for impeachment purposes.

2. On the other side of the balance, the purposes of the Sixth Amendment right to counsel would not be served by preventing impeachment with evidence deliberately elicited from an uncounseled defendant, just as they are not served by preventing impeachment with statements obtained in violation of *Jackson*. Exclusion of the evidence obtained in violation of Sixth Amendment standards from the government's case in chief serves to "assure fairness in the adversary criminal process." *Morrison*, 449 U.S. at 364; see *Harvey*, 494 U.S. at 351 ("evidence acquired in contravention of" both "constitutional guarantees" and "their corresponding judicially created protections" is inadmissible in the government's case in chief). But prohibiting the prosecution from using such evidence for impeachment would hinder, rather than further, that goal by permitting a defendant to testify falsely without fear of contradiction by his own prior inconsistent statements. The jury would thus be deprived of a full picture needed to assess the defendant's credibility. *Harvey*, 494 U.S. at 351-352; see *Cronic*, 466 U.S. at 655-656 (right to counsel relies on the premise that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free" (quoting *Herring* v. *New York*, 422 U.S. 853, 862 (1975)).

When a defendant takes the stand, and thus places his credibility in issue, the defendant is often exposed to the admission of evidence that would otherwise be inadmissible. For example, the Fifth Amendment protects the defendant against being compelled to testify, but once a defendant elects to testify, he cannot bar relevant cross-examination. See *Brown* v. *United States*, 356 U.S. 148, 154-155 (1958); *Rogers* v. *United States*, 340 U.S. 367, 373 (1951). The paramount interest in exposing the truth, once a defendant decides to testify, dictates that the jury be entitled to learn of facts that it otherwise would not hear. See *Mitchell* v. *United States*, 526 U.S. 314, 322 (1999); *Brown*, 356 U.S. at 156. The same principle applies when a defendant takes the stand and testifies contrary to previous voluntary statements made in violation of Sixth Amendment standards. "[A] criminal defendant's right to testify does not include the right to commit perjury." *LaChance* v. *Erickson*, 522 U.S. 262, 266 (1998). And the defendant's testimony "open[s] the door, solely for the purpose of attacking the defendant's credibility," *Walder*, 347 U.S. at 64, to the admission of his prior statements. While a defendant deciding whether to testify may thereby face a difficult choice, such choices are common in the criminal justice system, and the Constitution does not inherently forbid them. See *Jenkins* v. *Anderson*, 447 U.S. 231, 236-238 (1980).

Nor would any incremental deterrent effect from barring the impeachment use of statements deliberately elicited from an uncounseled criminal defendant justify the damage to the truth-seeking function of the trial. The statements are already unavailable to prove the government's case. Here, as in this Court's previous decisions, there is only a "speculative possibility" that police officers may have some incentive to disregard a suspect's

right to counsel in order to gain impeachment material, *Hass*, 420 U.S. at 723, and officers have significant disincentives to obtaining evidence in that fashion. To the extent that the Court requires the exclusion of "fruits" of such uncounseled statements, see *Nix* v. *Williams*, 467 U.S. at 442, officers risk the suppression of physical evidence that might otherwise have come to light by lawful means. And officers cannot reliably anticipate that such evidence would be admissible on inevitable discovery principles. *Id.* at 445.

The increasing professionalism of the police force and the possibility of internal discipline—which may limit police officers' careers and salary—will have an additional deterrent effect. See *Hudson*, 547 U.S. at 598-599. And prosecutors, who are bound by ethical obligations that limit contacts with indicted defendants in the absence of counsel, will be deterred from such conduct by the prospect of discipline by their employer and state bar. See, *e.g.*, Kan. Rules of Prof'l Conduct 4.2 (prohibiting attorneys from knowingly contacting a represented party without counsel's presence or valid consent); Model Rules of Prof'l Conduct 4.2 (same); see also 28 U.S.C. 530B(a) (federal government attorneys are subject to State rules of professional conduct); 28 C.F.R. 77.4(f) (2007) (Department of Justice attorneys may not direct an investigative agent under their supervision to engage in conduct that would violate the attorney's own ethical obligations). That array of disincentives lessens the likelihood that the impeachment exception will promote misconduct. See *Hudson*, 547 U.S. at 596-599.[7]

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[7] Because the Sixth Amendment is not violated absent the improper use of evidence at trial, see *Harvey*, 494 U.S. at 363 (Stevens, J., dissenting), a defendant could not seek damages under 42 U.S.C. 1983 based on a claim of alleged improper deliberate elicitation, standing

3. In the context of statements deliberately elicited from an uncounseled defendant, then, the cost of barring impeachment use of the defendant's statements substantially outweighs any benefit to the protection of Sixth Amendment rights. Sixth Amendment interests are adequately protected by excluding the defendant's statements from the government's case in chief. It is unnecessary to go further and impair the ability of a trial to disclose the truth by testing a defendant's testimony against his own contradictory, voluntary words. Accordingly, such statements may be introduced at trial for the limited purpose of impeaching the defendant once he testifies. In this case, there is no question that respondent's statements were voluntary, see J.A. 164, and the trial court therefore properly admitted those statements for impeachment.

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alone. If, however, a court allowed a damages action based solely on deliberate elicitation in violation of "Sixth Amendment standards," *Fellers*, 540 U.S. at 525, then Section 1983 actions (and related actions under *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)) would provide an additional deterrent.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a criminal defendant's voluntary statement obtained in the absence of a knowing and voluntary waiver of the Sixth Amendment right to counsel is admissible for impeachment purposes.

2. Whether there is any right to counsel to be waived when the police have merely placed an informant in defendant's jail cell and the informant does not engage in interrogation or its equivalent.

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IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

vs.

DONNIE RAY VENTRIS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The ruling of the Kansas Supreme Court in this case places an unnecessary obstacle in the police's ability to

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1. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

continue the investigation of facts surrounding a crime after a person has been charged with a crime. Adoption of the rule will effectively bar any evidence obtained by an undercover government informant in jail once criminal proceedings have begun. The decision has been made without regard for the reliability of any of the evidence obtained by the informant. The hostility to the use of informants needlessly hampers legitimate police investigation, depriving courts and juries of voluntary, and, in some circumstances, highly probative confessions. This rule places unreasonable limits on investigation and is contrary to the rights of victims which CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

In 2004, after several days and nights of methamphetamine and marijuana abuse, Donnie Ray Ventris and his live-in girlfriend, Rhonda Theel, decided to pay a visit to Ernest Hicks. *State* v. *Ventris*, 285 Kan. 595, 597, 176 P. 3d 920, 922 (2008). Theel believed that Hicks was abusing the children of his live-in girlfriend. *Id.*, at 596-597, 176 P. 3d, at 922. She also believed Hicks was wealthy and often carried around $500 to $600. *Ibid.* Theel arranged for her friend, Martha Denton, to meet her and Ventris for a ride. *Id.*, at 597, 176 P. 3d, at 922. Denton arrived with her boyfriend, Keith Holt. *Ibid.* Holt drove Theel and Ventris to Hicks' home. *Ibid.*

When they arrived, Theel went to the door while Ventris waited by the car. *Id.*, at 597, 176 P. 3d, at 923. Before Holt left, he saw Ventris pull a ski mask down over his face. *Ibid.* It was five to ten degrees Fahrenheit that day. *Ibid.*

"While Theel and Ventris were inside Hicks' residence, one or both of them shot and killed Hicks . . . ."

Ibid. The two took Hicks' wallet, approximately $300, Hicks' cell phone, and his truck. *Ibid.* Denton and Holt contacted police after developing a suspicion that Theel and Ventris had been involved in Hicks' murder. *Ibid.* Both Theel and Ventris were arrested and charged. *Ibid.*

Ventris was charged with felony murder, aggravated robbery, aggravated burglary, felony theft, and misdemeanor theft. *Id.*, at 598, 176 P. 3d, at 923. In exchange for her testimony against Ventris, Theel pled guilty to aggravated robbery and aiding a felon. *Ibid.* At Ventris's trial, Theel testified it was Ventris who brought the gun into the home, took Hicks into the bedroom, and shot him three times. *Ibid.*

Ventris's testimony contradicted Theel's account. Ventris testified that Theel had brought the gun to Hicks' home, and he had never intended to rob Hicks. *Ibid.* Ventris testified that although he physically struggled with Hicks, it was Rhonda Theel that pulled out the gun and demanded Hicks' money. *Id.*, at 598, 176 P. 3d, at 924.

After Ventris testified, the State offered rebuttal testimony from Ventris's cellmate, Johnnie Doser. *Ibid.* In his rebuttal testimony, Doser stated that he was approached by the police to be Ventris's cellmate. J. A. 146. Without promising to grant Doser any favors, the police told Doser "[j]ust to keep [his] ear open and listen" in case Ventris commented on his crimes. J. A. 146-147. On the first day, the two men did not speak much. *Ventris*, 285 Kan., at 616, 176 P. 3d, at 934 (McFarland, C.J., dissenting). "On the second day, Doser told Ventris he could tell by the look in his eyes that he had something more serious weighing on his mind." *Ibid.* Doser testified that Ventris told him "[t]hat him and his girlfriend, Rhonda, had went to rob somebody and that it went sour. He'd shot this man in

the head and in the chest. That he took his keys, his wallet, about $350.00, and took a vehicle." J. A. 150. On cross-examination, Doser testified he did not ask any questions but just let Ventris talk. J. A. 155.

Ventris's counsel objected to this testimony claiming it had been obtained in violation of his Sixth Amendment right to counsel. *Ventris*, 285 Kan., at 599, 176 P. 3d, at 924. Although the trial court believed case law allowed Doser's placement in the cell, the State conceded that Doser was placed in the cell, "and there's probably a violation." J. A. 143. According to the State, however, case law allowed the testimony in order to impeach Ventris. *Ibid.* The trial judge overruled Ventris's objection without finding a constitutional violation. *Ibid.*

The jury, who had been instructed to consider the testimony of both Theel and Doser "with caution[,]" J. A. 30, convicted Ventris of aggravated burglary and aggravated robbery. *Ventris*, 285 Kan., at 599, 176 P. 3d, at 924. The jury acquitted Ventris of the felony murder and misdemeanor theft. *Ibid.*; see also J. A. 163. Ventris was sentenced to 247 months for aggravated robbery and 34 months for aggravated burglary. *Ventris*, *supra*, at 599, 176 P. 3d, at 924. The state Court of Appeals affirmed in a decision without a published opinion. *State* v. *Ventris*, 142 P. 3d 338 (Kan. App. 2006). The Kansas Supreme Court reversed the convictions and vacated the sentences. 285 Kan., at 608, 610, 176 P. 3d, at 929, 930.

This Court granted certiorari on October 1, 2008.

SUMMARY OF ARGUMENT

The question presented by petitioner relates to the admissibility for impeachment of evidence obtained

without a waiver of the right to counsel during a conversation between a defendant awaiting trial and an undercover informant. Fairly included in that question is whether there was any Sixth Amendment right to waive.

The Sixth Amendment rule, as established in *Massiah* v. *United States* and *United States* v. *Henry*, is that once a person is charged and requests representation, the police may not interrogate that person about the charged offense without the assistance of counsel. Listening to that person's voluntary confession, however, is acceptable. The clear rule of *Kuhlmann* v. *Wilson* allows confessions obtained by the passive listener. The rule should not be obscured because of a hostile fear of surreptitious police conduct.

At its core, the Sixth Amendment is meant to assure a person assistance in his trial defense. As the complexities of trial preparation have developed, the right to counsel has been extended to include some of the events leading up to trial, such as pretrial lineups. The right has not yet been extended to the limits proposed by the Kansas Supreme Court. An "egregious" constitutional violation does not occur every time the prosecution uses information obtained from government informants; Sixth Amendment violations occur only when an informant interrogates the accused.

Extension of *Massiah* to obscure the established rule is unnecessary. *Massiah* was established without historical justification, and, instead of extending its reasoning, this Court has generally reined in its application. Furthermore, in the present case, the need to extend *Massiah* is extremely limited. The testimony of jailhouse informants is viewed with an inherent skepticism, and its credibility can be challenged at trial. The basic protections of *Massiah* are unnecessary here, as

the accused has not been subject to coercion or the intricate procedures of the criminal law.

The Kansas Supreme Court's rule extended *Massiah* protections at the expense of *Kuhlmann* v. *Wilson*, the precedent most relevant to this case. It established a blanket prohibition against the use of jailhouse informants in these circumstances and barred their testimony whether reliable or not. The rule's inconsistency with general Sixth Amendment principles should be addressed, and the Kansas Supreme Court's ruling should be reversed.

ARGUMENT

I. Whether there was a Sixth Amendment violation at all is fairly included in the question presented.

Petitioner asks this Court to clarify whether "in the absence of a knowing and voluntary waiver of the right to counsel" a statement may be admissible for impeachment purposes. Pet. for Cert. 2. The impeachment question raised by Petitioner assumes that a Sixth Amendment violation resulted from a "police-initiated interrogation." See *Michigan* v. *Jackson*, 475 U. S. 625, 636 (1986). But the facts of this case do not clearly demonstrate that this was the type of "police-initiated interrogation" that violates the Sixth Amendment. Before limited admissibility for impeachment is addressed, it should be determined whether the police tactics used in this case violated the Sixth Amendment at all. *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), held that mere placement of an agent in a jail cell does not create the "police-initiated interrogation" that constitutes a "critical stage" for the purpose of Sixth Amendment jurisprudence. To fully resolve the Sixth Amend-

ment issues of this case, a discussion of *Wilson* and its holding is necessary.

The questions properly before the Court include the questions presented in the certiorari petition and any "subsidiary question fairly included in the question presented." *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994); Supreme Court Rule 14.1(a). Whether Ventris had a right to counsel in his cell is "fairly included in the question presented" and a "necessary predicate" to determining whether the evidence at issue in this case was admissible. See *Bohlen*, *supra*, at 390. In this case, if it is determined that Ventris's right to counsel was not violated, resolution of whether a statement obtained in violation of that right is admissible for the limited purpose of impeachment is not necessary. In *Ohio* v. *Robinette*, 519 U. S. 33, 35 (1996), the question presented was whether an advisement was required before asking a lawfully stopped motorist for consent to search. The question of whether the motorist really was lawfully stopped at that point was "a 'predicate to an intelligent resolution' of the question presented and therefore 'fairly included therein.' " *Id.*, at 38. As it was in *Robinette*, the lawfulness of the police's initial action is a "necessary predicate" to the question of the lawfulness of the subsequent action.

II. The *Massiah* rule lies outside the core concerns of the Sixth Amendment.

An educated layman who simply read the Bill of Rights and then read the facts of this case would find it very strange that the Sixth Amendment is involved at all. Both the specific question of self-incrimination and the general question of a fair trial (due process) are governed by the Fifth Amendment. A brief review of

how we got here is in order to place the specific question in context.

A. The Path to Massiah.

At its core, the Sixth Amendment is meant "to assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash*, 413 U. S. 300, 309 (1973). From ratification until 1932, the defendant's constitutional right "to have Assistance of Counsel for his defence[,]" meant only that courts could not prohibit a defendant from retaining counsel for a criminal trial if he so desired. See E. Hickok, The Bill of Rights: Original Meaning and Current Understanding 367 (1991). For many years, this Court "held that confessions made by indigent defendants prior to state appointment of counsel are not rendered involuntary, even in prosecutions where convictions without counsel violate due process under the Fourteenth Amendment." *Crooker* v. *California*, 357 U. S. 433, 438 (1958) (citing *Brown* v. *Allen*, 344 U. S. 443, 474-476 (1953); *Stroble* v. *California*, 343 U. S. 181, 196-198 (1952); *Gallegos* v. *Nebraska*, 342 U. S. 55, 64-68 (1951)). When it came to confessions, the Sixth Amendment right to assistance was violated only if a defendant was "so prejudiced . . . as to infect his subsequent trial with an absence of 'that fundamental fairness essential to the concept of justice.' " *Crooker*, *supra*, at 439 (quoting *Lisenba* v. *California*, 314 U. S. 219, 236 (1941)).

The following year, the defendant in *Spano* v. *New York*, 360 U. S. 315, 320 (1959), sought to distinguish *Crooker* on the ground that he had been indicted before the interrogation. The majority found it unnecessary to resolve this question, reversing on voluntariness grounds, see *ibid.*, but two concurring opinions accepted

this argument. See *id.*, at 324-326 (Douglas, J., concurring); *id.*, at 326-327 (Stewart, J., concurring). Both opinions are conclusory and include no historical examination of the Sixth Amendment.

Finally, in *Massiah* v. *United States*, 377 U. S. 201 (1964), the rule proposed in *Spano* was adopted. Like the *Spano* concurrences, the *Massiah* opinion is devoid of historical support for the rule it adopted. The primary authorities cited are the *Spano* concurrences and post-*Spano* New York state cases. See *id.*, at 204-205, and n. 5.

The *Massiah* opinion asserts,

> "This view *no more* than reflects a constitutional principle established as long ago as *Powell v. Alabama*, 287 U. S. 45, where the Court noted that, '. . . during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself.' *Id.*, at 57." *Id.*, at 205 (emphasis added).

In fact, this view asserts a great deal more than *Powell* v. *Alabama*, 287 U. S. 45 (1932). *Powell* was a capital case where "until the very morning of trial, no lawyer had been named or definitely designated to represent the defendant." *Id.*, at 56. Hence they had no assistance at all in the pretrial preparation phase. See *id.*, at 57. The pretrial right to counsel in *Powell* was the right to the usual preparations for trial that retained counsel would make. To say that a right to counsel in a defendant's conversation with his accomplice reflects no more than the *Powell* principle is absurd. As an analysis by the Office of Legal Policy later concluded,

"The *Massiah* doctrine . . . [has] no support in history . . . ." Office of Legal Policy, Report to the Attorney General on the Sixth Amendment Right to Counsel Under the Massiah Line of Cases (1986), reprinted in 22 U. Mich. J. L. Ref. 661, 664 (1989). "The doctrinal underpinnings of *Massiah* have been largely left unexplained . . . ." *United States* v. *Henry*, 447 U. S. 264, 290 (1980) (Rehnquist, J., dissenting); see also *Massiah*, 377 U. S., at 209 (White, J., dissenting) ("so far unarticulated").

B. A Rule in Search of A Reason.

Massiah transformed the right to assistance of counsel at trial and in necessary preparation before trial into a regulation of pretrial conduct by the police. The absence of a foundation for this doctrine helps explain some of the inconsistencies in the cases mapping its scope.

The high water mark in the definition of the "critical stages"—where the defendant has a right to the presence of counsel—can be found in the lineup case, *United States* v. *Wade*, 388 U. S. 218, 226 (1967), where the right is said to extend to "any stage . . . where counsel's absence might derogate from the accused's right to a fair trial." Given the possibilities implied by the word "might," this would be a revolutionary rule, sweeping in grand jury proceeding and police interviews of witnesses among many other activities, but it has not been so applied. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1157-1158 (1987). Adverse consequences alone were found insufficient to trigger the Sixth Amendment "critical stage" right in *Moran* v. *Burbine*, 475 U. S. 412, 431-432 (1986).

The Sixth Amendment right has been limited to events after the formal initiation of proceedings. See *McNeil* v. *Wisconsin*, 501 U. S. 171, 175 (1991); *Texas* v. *Cobb*, 532 U. S. 162, 167-168 (2001). This limitation of the rule seems oddly detached from the reasons advanced for the rule. Neither the perceived need to assure that the trial is not reduced to a mere formality, see *Wade*, 388 U. S., at 224, nor the need for professional assistance in dealing with a professional adversary, see *United States* v. *Ash*, 413 U. S. 300, 313 (1973), is affected in the least by the timing of an interrogation or lineup before or after indictment.

For a doctrine based entirely on its practical effects to be bounded by a limit having nothing to do with practical effects is strange. This anomaly is just one more indication that the entire *Massiah* rule is a house of cards. It is not a fundamental right that is a part of our nation's heritage. The Kansas Supreme Court's denunciation of the police tactics as "particularly egregious," *State* v. *Ventris*, 285 Kan. 595, 607, 176 P. 3d 920, 929 (2008), is strange enough when one considers the strong argument that the police were within the bounds of the rule as established by this Court. See Part III, *infra*. But it is doubly strange when one considers that the rule itself is completely lacking any constitutional foundation.

III. *Wilson*, not *Henry*, is the controlling precedent in this case.

When the Kansas Supreme Court rejected the State's impeachment argument in *State* v. *Ventris*, 285 Kan. 595, 176 P. 3d 920 (2008), it emphasized that Ventris's statements were made to a jailhouse informant. *Id.*, at 603, 176 P. 3d, at 926. In stressing this point, the court relied heavily on *United States* v.

Henry, 447 U. S. 264, 270 (1980), which in turn had relied on *Massiah* v. *United States*, 377 U. S. 201 (1964). From *Massiah* and *Henry*, the state court derived a rule that "[w]ithout a knowing and voluntary waiver of the right to counsel, the admission of the defendant's uncounseled statements to an undercover informant who is secretly acting as a State Agent violates the defendant's Sixth Amendment rights." *Ventris*, *supra*, at 606, 176 P. 3d, at 928. In light of *Kuhlmann* v. *Wilson*, 477 U. S. 436 (1986), this decision misses the mark.

To reach its decision, the Kansas Supreme Court relied on its 1975 decision in *State* v. *McCorgary*, 218 Kan. 358, 543 P. 2d 952 (1975), cert. denied, 429 U. S. 867 (1976). *McCorgary* provided the foundation for the court's finding "that the State initiated the contact with the jailhouse informant and arranged to secretly monitor the defendant's statements . . . ", an act "the State knew . . . violated Ventris's *Sixth Amendment* rights." *Ventris*, 285 Kan., at 607, 176 P. 3d, at 929 (emphasis in original). But as the dissenting opinion points out, reliance on *McCorgary* to support a federal Sixth Amendment right is in error. See *id.*, at 616-617, 176 P. 3d, at 933-934 (McFarland, J., dissenting). *McCorgary* was decided before *Wilson*, a decision that squarely holds the Sixth Amendment is not violated when the State asks an informant to act as a listening post, or to monitor the statements of the accused. See *Wilson*, 477 U. S., at 459.

In the time period between *Massiah* and *Henry*, this Court repeatedly refused to find that the Constitution protected the defendant from information disclosed to government informants pretrial. "The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the condition of

human society. It is the kind of risk we necessarily assume whenever we speak." *Hoffa* v. *United States*, 385 U. S. 293, 303 (1966) (quoting *Lopez* v. *United States*, 373 U. S. 427, 465 (1963) (Brennan, J., dissenting)). However, *Henry* found the right to counsel to prohibit use of a confession given to a government informant in the jail cell. 447 U. S., at 273-274.

Relying on *Massiah*, the *Henry* Court stated the question as "whether, under the facts of this case, a Government agent had 'deliberately elicited' incriminating statements from Henry." *Id.*, at 270. For the majority, "deliberate elicitation" was not the result of direct interrogation. Instead, factors including Henry's incarceration, and the possibility that "confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents[,]" led the Court to believe a "critical" pretrial event, requiring the assistance of counsel, had occurred. See *id.*, at 269, 274-275.

For concurring Justice Powell, however, incarceration was not a reason to extend Sixth Amendment protection. Justice Powell believed Sixth Amendment protection should be invoked when the government's conduct reached the "functional equivalent of interrogation." *Id.*, at 277 (Powell, J., concurring). More clearly, Sixth Amendment protection is necessary when "the informant's actions constituted deliberate and 'surreptitious interrogatio[n]' of the defendant. If they did not, then there would be no interference with the relationship between client and counsel." *Id.*, at 276. While Justice Powell believed *Massiah* to protect against the act of deliberately eliciting incriminating information from an indicted defendant, *id.*, at 275, the majority found *Massiah* to encompass the intentional creation of "*a situation* likely to induce Henry to make incriminat-

ing statements without the assistance of counsel . . . ." *Id.*, at 274 (emphasis added).

As Justice Blackmun noted in dissent, *Henry* purported to retain the "deliberately elicited" test but "sap[ped] the word 'deliberately' of all significance," see 447 U. S., at 279, and then went on to misapply even that expanded test. See *id.*, at 282. Fortunately, this regime did not last long. *Kuhlmann* v. *Wilson* restored a reasonable limit to the *Massiah* rule.

In *Wilson*, the defendant was charged with the robbery of a taxi garage and the murder of its night dispatcher. 477 U. S., at 438-439. He was placed in a cell with Lee, a man who had agreed to act as a government informant. *Id.*, at 439. The informant had been instructed only to listen and not to ask questions. *Ibid.* When Wilson made incriminating statements in response to Lee's comment that Wilson's claim of innocence "didn't sound too good," *id.*, at 439-440, n. 1, Wilson's confessions were used to prosecute him. *Id.*, at 440.

When *Wilson* reached the Supreme Court, this Court found that even though police had intentionally placed the accused in the cell with a prisoner who had agreed to act as a government informant, Sixth Amendment rights were not violated so long as the informant acted only as a listening post. Relevant to the decision were the facts that the informant had not " 'asked any questions' of respondent [Wilson] concerning the pending charges, and that he 'only listened' to respondent's 'spontaneous' and 'unsolicited' statements." *Id.*, at 460. So, in the absence of "deliberate elicitation," no constitutional violation had occurred. *Id.*, at 460-461. While the holding acknowledged that *Henry* generally controls, *Henry* was limited because the *Henry* Court had not addressed whether the Sixth Amendment was violated when a jailhouse informant passively listened

to the accused. See *id.*, at 456. The specific rule controls a general rule, and therefore, *Wilson* is precedent when a jailhouse informant only listens. *Ibid.*

When it came to whether the Sixth Amendment protected the accused from a passive listener, *Wilson* returned to reasoning similar to that embraced in *Hoffa*. See *supra*, at 12. Just as *Hoffa* had found no Fourth Amendment violation for information disclosed to informant or eavesdropper, *Wilson* held "the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." *Wilson*, 477 U. S., at 459. Wilson's confession, like Ventris's, was obtained without evidence of deliberate elicitation. *Id.*, at 460. The officer had instructed the informant just to listen in case Wilson mentioned the identities of his criminal cohorts. *Ibid.* The police were not looking for Wilson's confession because, like Ventris, they already had eyewitness testimony linking Wilson to the crime. *Ibid.*; *Ventris*, 285 Kan., at 597, 176 P. 3d, at 923. Furthermore, the informer's sole remark, that Wilson's story "didn't sound too good," *Wilson*, *supra*, at 460, bears a strong resemblance to Doser's statement that he could tell "something more serious [was] weighing on [Ventris's] mind." *Ventris*, *supra*, at 616, 176 P. 3d, at 934 (McFarland, C.J., dissenting). Significantly, *Wilson* omitted from its discussion the factors that *Henry* had found relevant. The factors of confinement and the close relationship of the government informant to the accused had no bearing on the new Sixth Amendment protection against "techniques that are the equivalent of direct interrogation." *Wilson*, *supra*, at 459. Wilson illustrates that mere placement of an informant in a cell is not a violation of *Massiah*.

Wilson made clear what *Henry* had left in doubt. Surreptitious placement of an informant is acceptable; interrogation or its equivalent to obtain a confession is not. Placement of an informant in the proximity of an accused by itself does not constitute a "critical stage" requiring the presence of counsel. As the last case on this issue, *Wilson*'s interpretation of the *Massiah* right controls. The risk Ventris took when he confided in Doser is not the fault of the State. To uphold such a conclusion would exceed *Wilson*'s understanding that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Ibid.*

Illinois v. *Perkins*, 496 U. S. 292 (1990), does not require a contrary conclusion. A passing comment in *Perkins* summarized the *Massiah* line as holding "that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel." *Id.*, at 299 (citation omitted).

However, this passage in *Perkins* is dicta, and it does not change the rule laid down in *Wilson*. In *Perkins*, a defendant was charged and incarcerated for a crime unrelated to the murder that an undercover agent was investigating. *Id.*, at 294. The agent was placed in the jail, and, during incarceration, Perkins made incriminating statements to the agent that ultimately led to Perkins being charged for murder. *Id.*, at 294-295. In concluding there had been no "incommunicado interrogation of individuals in a police dominated atmosphere[,]" *id.*, at 296 (citations omitted), and consequently no Fifth Amendment violation, this Court noted "our Sixth Amendment precedents are not applicable." *Id.*, at 299. The Court then went on to

briefly discuss *Massiah* and *Henry*. *Ibid.* The brief discussion of the scope of the Sixth Amendment right after a holding that the Sixth Amendment is inapplicable is *obiter dictum*. It is the holding of *Wilson*, not the dicta of *Perkins* that the Court must attend. See *Kokkonen* v. *Guardian Life Ins. Co.*, 511 U. S. 375, 379 (1994).

Maine v. *Moulton*, 474 U. S. 159 (1985), decided a few months before *Wilson*, is distinguishable from *Wilson* and the present case. In *Moulton*, the co-defendant feigned forgetfulness to induce Moulton to make incriminating statements as police listened in. *Id.*, at 165-166. This was seen as a way of "knowingly circumventing the accused's right to have counsel present *in a confrontation* between the accused and a state agent." *Id.*, at 176 (emphasis added). Distinguishing *Moulton* on grounds that the police had circumvented the Sixth Amendment in order to confront and directly interrogate Moulton, *Wilson* clarified that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Wilson*, 477 U. S., at 459.

That equivalence is the key. Whether incriminating statements are elicited surreptitiously or openly is "constitutionally irrelevant." *Brewer* v. *Williams*, 430 U. S. 387, 400 (1977). *Wilson* controls this case. There is no material difference in the facts. See *supra*, at 15. Doser's testimony was admissible.

IV. *Massiah* should not be extended any further.

Massiah v. *United States*, 377 U. S. 201 (1964), was a revolutionary—and "strangely durable"—decision. The revolution occurred as this Court chose a tradi-

tional trial right to regulate how the government investigated the accused before trial. The decision is "strangely durable" given that this Court has never adequately explained or satisfactorily grounded the right in Sixth Amendment principles. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1155 (1987). Without addressing why the right to counsel is constitutionally required in *Massiah*-type interrogation, this Court has consistently recognized a defendant is entitled to counsel during interrogation once he reaches the status of "accused." See Part II-B, *supra*, at 10-11. But *Massiah* has its limits. There can be no Sixth Amendment violation if a confession is obtained outside the "critical stage" where assistance of an attorney is necessary.

The classical justification for the right to counsel is found in *Powell* v. *Alabama*, 287 U. S. 45 (1932).

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence,

how much more true is it of the ignorant and illiterate, or those of feeble intellect." *Id.*, at 69.

Powell thereby established a Sixth Amendment right at the "critical" stages of prosecution. *Id.*, at 57. Typically, critical is seen as a stage at trial, but it can also apply to pretrial events. See *ibid.* Relevant here is this Court's repeated recognition of the Sixth Amendment's courtroom origins. Quoting *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972), *United States* v. *Gouveia*, 467 U. S. 180, 189 (1984), stated, "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from mere formalism.' " "[C]ritical confrontations with his adversary" evokes an image of the question and answer session between a practiced interrogator, such as a prosecutor or police officer, and a defendant. The same language does not evoke the image of two cellmates engaged in a discussion of their criminal escapades. Even cases that created a rule of exclusion for certain methods of police interrogation, like *Henry*, *Massiah*, and *Moulton*, did so because the nature of a police adversary's conduct was so similar to the type of interrogation that occurred at trial that a contrary conclusion was implausible. See *Michigan* v. *Jackson*, 475 U. S. 625, 641, n. 4 (1986) (Rehnquist, J., dissenting).

Perhaps this is why the broad definition of "critical" that carried the day in *Massiah* and *Henry* has been reined in by this Court's more recent decisions. In *Moran* v. *Burbine*, 475 U. S. 412, 431 (1986), for example, this Court stated, "We do not doubt that a lawyer's presence could be of value to the suspect; and we readily agree that, if a suspect confesses, his attorney's case at trial will be that much more difficult." But,

these concerns are not decisive "[f]or an interrogation, no more or less than for any other 'critical' pre-trial event, the possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." *Id.*, at 432.

The basic formula for triggering a right to counsel remains unchanged; the right is triggered when adversarial judicial proceedings commence. *Rothgery* v. *Gillespie County*, 554 U. S. __, 128 S. Ct. 2578, 2583, 171 L. Ed. 2d 366, 374 (2008). Once the right is triggered, though, presence of counsel is only required for critical stages. See *id.*, 128 S. Ct., at 2591, 171 L. Ed. 2d, at 382; *id.*, 128 S. Ct., at 2594, 171 L. Ed. 2d, at 386 (Alito, J., concurring).

In jail cells, the need for an advocate is significantly limited. Unless the accused is being directly interrogated, the threshold for the "critical stage" has not been met. In *Illinois* v. *Perkins*, 496 U. S. 292 (1990), a decision addressing *Miranda* v. *Arizona*, 384 U. S. 436 (1966), this Court "reject[ed] the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent." *Perkins*, 496 U. S., at 297. Reasoning that "the premise of *Miranda*[, was] that the danger of coercion results from the interaction of custody and official interrogation," this Court found "no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent in the hope of more lenient treatment should he confess." *Id.*, at 296-297. As the *Wilson* Court had stated, the *Massiah* line of cases is primarily concerned with a need to protect against "secret interrogation by investigatory techniques," *Wilson*, 477 U. S., at 459, that need is absent unless

there was some evidence of interrogation or its equivalent.

United States v. *Wade*, 388 U. S. 218, 227 (1967), held that the Sixth Amendment "requires [this Court to] scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself." But see *supra*, at 10. *Wade* recognized this right to counsel at a pretrial lineup. *Id.*, at 236-237. Certain efforts to identify the accused, like fingerprints, blood samples, hair, and clothing, did not require the presence of counsel, because defense experts and cross-examination could effectively counter that evidence. A lineup was different because it posed a risk of misidentification of the perpetrator that could not be corrected, and therefore it detracted from the defendant's right to a fair trial. *Id.*, at 227-228. A lineup required someone with counsel's knowledge of the problems and practices of lineups that result in a wrongful identification, *id.*, at 230-231, because "the confrontation compelled by the State between the accused and the victim or witness to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial." *Id.*, at 228. "In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification." *Id.*, at 231-232.

The same is not true for courtroom testimony from a jailhouse informant. In jail, the informant is just another inmate, not a trained professional. In court, the jailhouse informant comes before the jury with his

credibility already under suspicion. Jurors are aware that the informant came from jail, and may be advised that they must consider the informant's testimony "with caution." See *State* v. *Ventris*, 285 Kan. 595, 599, 176 P. 3d 920, 924 (2008); J. A. 30. At trial, the defendant, or his counsel, has ample opportunity to further attack the credibility of the informant's testimony through direct confrontation. Cf. *Wade*, 388 U. S., at 232. It is then up to the jury to determine which biased testimony to believe. As a practical matter, extending the right to counsel to this situation would effectively ban the use of informants. As Justice Jackson pointed out, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances," *Watts* v. *Indiana*, 338 U. S. 49, 59 (1949) (opinion concurring in the result). The same is obviously true for cellmates.

Defendant protests that in this particular case the government did not insure the veracity of the informant's testimony by recording the conversations in the jail cell. See Brief in Opposition 8; cf. *Massiah*, 377 U. S., at 202-203. However, the rule promulgated by the Kansas Supreme Court in this case is not limited to unrecorded or unreliable statements. Even the highly reliable evidence of a recorded confession of the defendant made in a completely uncoerced conversation would be excluded under this rule.

The highly probative evidence of the defendant's freely given confession in his own recorded words would, of course, make conviction nearly certain. However, a fair trial does not mean one where each party has a good chance of winning. A trial is not supposed to be a handicapped sporting event. See Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Colum. L. Rev. 1137, 1173-

1175 (1987). The purpose of a trial is to ascertain the truth. See *Ohler* v. *United States*, 529 U. S. 753, 763-764 (2000) (Souter, J., dissenting). A rule that excludes evidence without any regard for its reliability, as the Kansas Supreme Court's rule would, does not advance that function. See *Portuondo* v. *Agard*, 529 U. S. 61, 79 (2000) (Ginsburg, J., dissenting). Of course, reliable, conclusive evidence may predetermine the outcome of the trial, see *Wade*, 388 U. S., at 225-226, but that does not make the obtaining of the evidence unfair. A voluntary, preindictment, out-of-custody confession or conclusive forensic evidence will do the same, but no serious argument could be made that they should be excluded.

In this case, the defendant's statement was not recorded but instead was related by a dubious jailbird. The prosecution has already paid a heavy price for this misstep. The jury was unwilling to place the requisite degree of confidence in Doser and acquitted Ventris of the murder. They only convicted him of the burglary and robbery, crimes confirmed by independent testimony, including Ventris's donning a mask before going to the victim's house. See *supra*, at 2. The jury received the evidence with the appropriate degree of skepticism.

Massiah is an exception to the general rule that the right to counsel guards against wrongful convictions through effective assistance in the trial itself and in counsel's own preparation for it. Absent a special threat to a fair trial, or initiation of complex legal proceedings, the presence of counsel is neither critical nor required. *Massiah*'s "strangely durable" precedent operates to protect the defendant during police interrogation or its equivalent, but it should not be extended any further.

Leaving the Kansas Supreme Court's opinion undisturbed on the underlying Sixth Amendment question could have a serious and injurious impact on law enforcement. If the law is "clearly established," at least in Kansas, that what the police did in this case is a violation of the Sixth Amendment, both the municipalities and the officers personally may be liable for damages in civil actions in any future cases similar to this one. See Brief for Petitioner 25-28. However, the tactics of the police in this case are not materially distinguishable from those upheld in *Wilson*. See *supra*, at 15. To strip peace officers of their immunity when their actions are fully consistent with a precedent of this Court would be intolerable.

CONCLUSION

The judgment of the Supreme Court of Kansas should be reversed.

November, 2008

Respectfully submitted,

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AMICUS CURIAE BRIEF

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v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari
to the Supreme Court of Kansas

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INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately thirty-five *amicus* briefs each year on various issues in this Court and other courts.

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[1] Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Petitioner has filed a global consent to *amicus* filings, and a letter of consent to the filing of this brief from respondent has been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

Kansas seeks a blanket rule that "criminal defendants' voluntary statements should be admissible for impeachment purposes," Pet. 18, on the ground that impeachment via such statements serves "the fundamental purpose of our adversary system—to seek the truth." Petr. Br. 22. But Kansas ignores a foundational element of truth-seeking: reliability. Statements used for impeachment cannot advance the truth if they are unreliable in the first place. And the particular kind of statement at issue in this case – a jailhouse snitch's uncorroborated claim that the defendant confessed to him – is notoriously unreliable. Accordingly, whatever the general rule may be with respect to whether voluntary statements secured in violation of the Sixth Amendment are admissible for impeachment purposes, this Court should hold here that the Constitution forbids the introduction of uncorroborated snitch testimony for this purpose.

I. In criminal cases, the reliability of assertions that defendants have made incriminating statements varies depending on the circumstances surrounding the alleged statements. On one end of the spectrum, confessions made in open court have several indicia of trustworthiness because they are made by the defendant, under oath, in front of a judge and jury and with counsel present. When a police officer swears that a defendant has voluntarily confessed, still other relevant safeguards attach: officers receive training designed to insure that the statements they receive are both reliable and obtained

constitutionally. Finally, disinterested citizen-witnesses have little motive to lie about a defendant's statements.

At the other end of the spectrum lie accomplices and jailhouse informants, commonly known as "snitches." Admitted criminals themselves, they have strong motives to lie. And while accomplice testimony retains at least some indicia of reliability, because the accomplice inculpates herself in the process, snitch testimony lacks even this form of corroboration.

The problems posed by snitch testimony are especially pernicious in the cases in which reliability matters the most – for example, cases in which the evidence absent the snitch testimony is thin, or those that hinge on the jury's choosing between conflicting in-court testimony by the defendant and another witness. Yet it is precisely these kinds of cases in which prosecutors may be particularly inclined to emphasize snitch testimony or to actively recruit a snitch to secure a conviction.

Generally, snitches have incentives to fabricate testimony in the hopes of currying favor with prosecutors and receiving benefits – such as improved prison conditions, a reduced sentence, or dropped charges. As a result, some snitches go to extraordinary lengths to learn about open cases, locate defendants, and fabricate their confessions. These snitches face strong incentives to produce statements that will help the prosecution, even if that means falsifying them. Worst of all are snitches who are repeat offenders, handpicked by the police to share a jail cell with the defendant and to obtain confessions. These career snitches have little to lose,

and much to gain, from falsifying testimony, and they may be most willing to perjure themselves.

II. The criminal justice system is ill-equipped to ensure the reliability of snitches or to detect perjured testimony. Prosecutors may be pre-disposed towards a defendant's guilt and therefore inadequately skeptical of snitch testimony. Defense counsel are hard-pressed to remedy these problems, because they cannot monitor clients while they are in jail or moving from cell to cell. And once the case goes to trial, defense counsel are hampered in either conveying fully to the jury the strong motives that snitches have to lie or otherwise rebutting snitch testimony.

III. Recognizing just these problems of unreliability, many states now require corroboration for accomplice testimony, which is less dangerous but more prevalent. At a minimum, snitch testimony should be admissible for impeachment purposes only if it satisfies similar corroboration requirements.

ARGUMENT

Kansas's argument that snitches should be permitted to testify about confessions purportedly made to them rests on the hypothesis that defendants actually make incriminating statements to snitches, that snitches accurately remember and relay those statements, and that, as a result, snitch testimony is truthful. Based on this assumption, the State argues that snitch testimony furthers the truth-seeking process. This analysis, however, cannot withstand scrutiny, as snitch testimony is often fabricated and unreliable.

I. Snitches Are Particularly Likely To Provide Unreliable Testimony About Defendants' Purported Confessions In Light Of The Incentives They Face.

Snitches are often recidivists, who are inherently unreliable individuals. In addition, snitches are given strong incentives to lie through the promise of dropped charges, reduced sentences, or jailhouse benefits. Some are even put in a position to frame another individual for a crime they themselves committed. The result – untrustworthy recidivists faced with strong incentives to lie – leads to testimony that is often false and that undermines, rather than furthers, the truth-seeking process.

A. "Career Snitches" Pose A Special Threat To Reliability.

Career snitches, by definition, are individuals who disregard legal obligations: if they were not charged repeatedly with violating the law, they would not find themselves so often in jail in the first place. As a result, their testimony is inherently suspect and self-interested.

By definition, "[a]ll jail house informants are incarcerated. They necessarily are charged with, or have been convicted of, a crime. These crimes include the most serious and often heinous crimes." REPORT OF THE 1989-90 LOS ANGELES COUNTY GRAND JURY, INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 9 (June 16, 1990) [hereafter GRAND

JURY REPORT].[2] Not only are snitches by implication criminals, but a majority of them have "recidivistic tendencies." *Id.* at 10. They thus frequently find themselves in jail, faced with the prospect of increasingly longer sentences as a result of their recidivism.

As some recidivists spend time in jail, they become "career snitches," who have learned how to manipulate the system to their advantage and provide falsified testimony most effectively. Once recidivists have established themselves as persuasive snitches, the police sometimes use them repeatedly, even after learning that they have falsified testimony in prior cases. For example, after one snitch was diagnosed as a pathological liar, the police continued to use him several more times. GRAND JURY REPORT, *supra*, at 16. Some police departments even have holding cells called an "informant tank" in which known snitches are kept. ROBERT M. BLOOM, RATTING 66 (2002). When the police need more evidence against an individual, the detective on the case will request that his suspect be placed in the informant tank. *Id.*; *see also, e.g.*, Br. of Resp. 2-3,

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[2] In 1989 to 1990, in the wake of an admission by one career snitch, Leslie White, that he had repeatedly fabricated testimony in prosecutions of other individuals, a grand jury in Los Angeles County conducted an extensive investigation into the use of jailhouse informants. ROBERT M. BLOOM, RATTING 65 (2002). The grand jury issued a report that summarized the results of its investigation and "recommend[ed] policies and procedures . . . [to] prevent or curtail the emergence of" problems relating to the use of snitch testimony in the future. GRAND JURY REPORT, *supra*, at 5.

Van de Kamp v. Goldstein, *cert. granted*, 128 S. Ct. 1872 (2008) (No. 07-854) (prosecutor acknowledged that murder case "was filed in great haste" but emphasized that "[f]iling officers . . . [had] assure[d him] that it will get stronger"; police then purposely placed a career snitch in the defendant's cell, and the snitch reported an alleged confession the next day) (citing J.A. 29, 30, 37-39)).

B. Snitches Have Strong Incentives To Lie.

Because testifying for the prosecution promises remuneration, reduced sentences, and other benefits, snitches face strong – and sometimes irresistible – incentives to lie.

1. The Los Angeles grand jury investigation revealed that "in the vast majority of cases it is a benefit, real or perceived, for the informant or some third party that motivates the cooperation." GRAND JURY REPORT, *supra*, at 12. That expectation is well placed, as virtually all snitches receive some benefit – ranging from reduced sentences and release to better conditions of confinement – in exchange for their testimony. *Id.* While these benefits may influence all snitches, career snitches benefit even more fully. After their testimony (valid or not) yields them benefits or even a ticket out of jail, they are more likely to provide testimony in the future, when they once again face the prospect of punishment and see an opportunity to cut a deal.

For snitches, "the ultimate reward" is to be "release[d] from custody" in exchange for their testimony. GRAND JURY REPORT, *supra*, at 12. Prosecutors may drop charges pending against a snitch who testifies, thereby allowing him to avoid

not only jail time but also a record. *See* NORTHWESTERN CENTER ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM 13 (2004-2005) [hereinafter THE SNITCH SYSTEM] (discussing the case of Darryl Moore, who – as discussed below, *see infra* at 13-14, had pending drug and weapons charges dropped in exchange for his testimony and was immunized from prosecution despite admitting to involvement in contract murder case).

Snitches who are already serving time often have their sentences reduced in exchange for their testimony. For example, a snitch who testified against Charles Fain – who was charged with rape and murder in 1983 – had been facing 230 years in prison before he testified. After testifying, some of the charges against him were dropped and others were reduced; he was released just three years later. Hans Sherrer, *Charles Fain Proved Innocent of Murder, and Released After Almost 18 Years On Idaho's Death Row,* FOREJUSTICE, *available at* http://forejustice.org/wc/charles_fain.htm. As a result of these snitches' testimony, Fain was sentenced to death and spent nearly eighteen years on death row before being exonerated by DNA evidence. The Innocence Project, *Know the Cases, Charles Irvin Fain,* http://www.innocenceproject.org/Content/149.php. Ventris's case illustrates this very point: the informant Doser was in jail because he had violated his probation and was facing the possibility of prison time, but prosecutors recruited him and agreed to release him from probation in exchange for his testimony against respondent. BIO 3.

Finally, while serving their sentences, snitches can also avail themselves of other benefits that

improve their day-to-day lives, such as "added servings of food . . . extra phone call[s], visits, food or access to a movie or television." GRAND JURY REPORT, *supra*, at 12.

The expectation of this quid pro quo is engrained in the snitch's mind. Snitches fully expect to receive some benefit for any cooperation they give. This point was borne out by the L.A. County grand jury investigation, which interviewed or heard testimony from twenty-five snitches to gain additional insight into how the snitch system had operated. Although the investigation's staffers explicitly told the snitches that they had no ability to secure reduced sentences, some snitches nonetheless continued to "request[] further contacts" with those very staffers in the hope of garnering some benefit for their testimony. GRAND JURY REPORT, *supra,* at 22 n.12.

2. As the courts have long recognized, the benefits provided to snitches create strong incentives to lie. Chief Justice Warren stated that the incentives facing snitches result in "a serious potential for undermining the integrity of the truth-finding process in the federal courts." *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting); *see also* Judge Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996). The Fifth Circuit has also noted that "[i]t is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence." *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir.

1987).[3] *See also* GRAND JURY REPORT, *supra*, at 10-11 (concluding that "[t]he myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also a strong motivation to fabricate, when necessary, in order to provide such testimony").[4]

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[3] *See also Jackson v. Brown*, 513 F.3d 1057, 1077-78 (9th Cir. 2008) (affirming grant of habeas relief as to "special circumstances" finding in capital case based on testimony from two snitches who had falsely claimed that they had not received any benefits because "[c]orrecting the informants' perjury would have shown that each of these witnesses had a strong incentive to lie in order to secure Jackson's conviction"); *Zappulla v. New York*, 391 F.3d 462, 470 n.3 (2d Cir. 2004) ("Several reports have found that jailhouse informants have a significant incentive to offer testimony against other defendants in order to curry favor with prosecutors and that the proffered testimony is oftentimes partially or completely fabricated. Thus, the use of jailhouse informants to obtain convictions may be one of the most abused aspects of the criminal justice system.") (citations and internal quotation marks omitted); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (deeming "it obvious that promises of immunity or leniency premised on cooperation in a particular case may provide a strong inducement to falsify in that case").

[4] In 1996, a Canadian commission formed to investigate the use of jailhouse informants concluded that "[i]n-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth of their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove." HON. FRED KAUFMAN, THE COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN [hereinafter THE MORIN COMMISSION] 599 (Ont. Ministry of the Att'y Gen. 1998).

3. In addition to the benefits that snitches in general receive in exchange for their testimony, some snitches have an additional incentive to lie: they are the actual perpetrators of the crime at issue, and concocting a false confession shifts the prosecution's focus away from them. *See* THE SNITCH SYSTEM, *supra*, at 3. With personal knowledge of the crime, perpetrator-snitches are particularly well-placed to fabricate a convincing "confession" that describes how the crime was committed and thereby frame another individual for the crime.

Framing a stranger is often a more attractive option than implicating an accomplice, for two reasons. First, a co-defendant is often a friend of the snitch. Second, by implicating a co-defendant, a snitch is by extension implicating himself.

4. The many incentives that motivate a snitch to lie take on even greater significance when combined with the fact that snitches face little risk from testifying falsely. Snitches who lie "are rarely, if ever, prosecuted [and therefore,] informants realize they have little to lose by testifying falsely." BLOOM, *supra,* at 65. In Los Angeles County, for example, despite "[a]n appalling number of instances of perjury or other falsifications to law enforcement," investigators "failed to identify a single case of prosecution of an informant for perjury or for providing false information." GRAND JURY REPORT, *supra,* at 18, 90.

5. The incentives for false testimony potential snitches face are further exacerbated when snitches are affirmatively recruited by the police. In such a scenario, the pressure placed on a would-be informant can be overwhelming: the snitch fears

retaliation if she fails to return with the confession she was recruited to obtain.

In some cases, snitches may be pressured into working with police to ensure their own safety. For instance, in one case prison officials made numerous announcements suggesting that an inmate was an informant to force him to "seek the security provided by protective custody offered to informants," in the hope that he would eventually "begin to perform as an informant." GRAND JURY REPORT, *supra*, at 21. In another case, police promised a snitch benefits and allegedly threatened him with torture unless he provided evidence to implicate targets of an investigation. *Id.* at 23. After showing the snitch crime scenes and police files, police provided the snitch with statements for him to repeat while being recorded, claiming all along that he heard the primary suspects of the crime make these fabricated statements. *Id.* A third snitch "was stripped of his protective status" after he refused to continue cooperating. *Id.* at 24.

In contrast to the variety of benefits provided to snitches for testifying on behalf of the prosecution, there are few incentives for snitches to come forward with exculpatory information. Prosecutors are unlikely to offer any favorable treatment to individuals who come forward with statements that undercut the prosecution's case. And defense counsel and their clients can almost never provide any reward to such informants.

6. The literature confirms that the irresistible incentives to lie lead snitches to fabricate confessions. Consider the history of one prototypical snitch, Leslie White. JIM DWYER ET AL., ACTUAL INNOCENCE 165-67

(2000). As a habitual offender, he frequently looked for opportunities to obtain reduced sentences or prison privileges. BLOOM, *supra,* at 63-66. White provided testimony both while he was serving time in prison and while he awaited trial. Ultimately, he admitted that he had repeatedly fabricated the confessions to which he had testified. White was an expert at getting the information necessary to fabricate a confession. Among other things, he would use a phone at the jail to call various government agencies, impersonating government officials to obtain information about pending cases. *See* DWYER, *supra,* at 166. He would then use this information to construct a purported confession by the suspected inmate. After fabricating this confession, White would then go through the process of "booking" the inmate by telling other informants the same story so that they could corroborate the testimony by claiming to have heard the same confession. As with many snitches, White's testimony was often particularly harmful because the government would otherwise have lacked enough evidence to secure a conviction. BLOOM, *supra,* at 65.

Another example is Darryl Moore, a repeat offender with a record of violent crime. As one state's attorney described Moore, "[f]or money Mr. Moore either beats people, maims them, or, if need be, he will kill them for the right price." THE SNITCH SYSTEM, *supra*, at 13. Moore's testimony was so untrustworthy that his own mother once took the stand for the defense, testifying that Moore should not be trusted under oath. Although prosecutors in Illinois were well aware that Moore was unreliable, they nonetheless continued to use him as an

informant and agreed to cut a deal with him. In exchange for his testimony against an alleged drug kingpin, Illinois paid Moore, dropped pending drug and weapons charges against him, immunized him from prosecution for his admitted involvement in a contract murder case, and released him. Moore eventually recanted and claimed that he knew nothing about the subject of his prior testimony, and indeed, that the prosecution had paid him to lie. *Id.*

Obviously, fabricated confessions cannot further the truth-seeking process. Instead, they result in unreliable convictions of innocent defendants. Consider, for example, Dennis Fritz and Ron Williamson, who were charged with murder years after the crime occurred. The Innocence Project, *Know the Cases, Dennis Fritz*, http://www.innocence project.org/Content/152.php. The case against the two men depended almost entirely on snitch testimony: none of the myriad fingerprints at the crime scene belonged to either man, and although the hairs at the scene supposedly "matched" Fritz and Williamson's, the prosecutors knew this evidence alone was insufficient to obtain a conviction. DWYER, *supra*, at 175, 177. Based primarily on snitch testimony, both men were convicted of murder, with Fritz sentenced to life in prison and Williamson sentenced to death. *Id.* at 178-79, 183, 186. Finally, after spending twelve years in prison, both men were exonerated by DNA evidence, which proved not only that they were not the perpetrators, but that one of the prosecution's other informants, Glen Gore, had actually committed the murder. *Id.* at 201-02. And this case is hardly an aberration: One study of capital case exonerations found that incentivized testimony

was "the leading cause of wrongful convictions," responsible for forty-five percent of them. THE SNITCH SYSTEM, *supra*, at 3.

II. The Adversarial Process Does Not Cure The Unreliability Of State-Recruited Snitch Testimony.

The problems that snitches pose are not addressed adequately by the adversarial system. Prosecutors can be unable or even unwilling to assess snitch testimony properly. Defense counsel lack the ability to protect their clients from snitches before trial or to effectively impeach snitches' testimony at trial.

A. Prosecutors Cannot Adequately Screen The Reliability Of Snitch Testimony.

Prosecutors often face special temptations and difficulties when presented with a purported confession obtained by a snitch.

1. Whether a snitch testifies at trial turns ultimately on whether the prosecutor believes the informant's testimony to be credible. Prosecutors tend to be confident in their ability to judge truthfulness and often think it is just "a 'matter of common sense.'" Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 943 (1999). But prosecutors face special problems in determining the truthfulness of jailhouse snitches.

Ironically, prosecutors have the strongest incentives to rely on snitches in cases in which they are least able to ensure veracity. "[I]n most situations a cooperator's value increases in inverse

proportion to the [other] information in possession of the prosecutor." Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 822 (2002). Snitch testimony is most valuable when the prosecutor otherwise has a weak case – for example, when there is little to no physical evidence and no eyewitness testimony – both because the prosecutor needs evidence and because the lack of other sources of information makes it more difficult for a defendant to rebut informant testimony. And sometimes prosecutors must choose between relying on unreliable snitch testimony and dropping charges altogether. For example, in the case of Dennis Fritz, *see supra* at 14-15, the snitch came forward with his testimony only one day before prosecutors would have been forced to drop charges for lack of evidence. The Innocence Project, *Know the Cases, Dennis Fritz*, http://www.innocenceproject.org/Content/152.php.

Especially in cases involving serious crimes, and therefore high stakes, prosecutors will be tempted to supplement thin evidence with snitch testimony. Thus, it is not surprising that reliance on incentivized testimony is the "leading cause of wrongful convictions" in capital cases. THE SNITCH SYSTEM, *supra*, at 3. For example, in the case of Gary Gauger, who was convicted and sentenced to death for the murder of his parents in 1994, prosecutors needed testimony to corroborate a disputed confession to the police that occurred after hours of interrogation. So they relied on Raymond Wagner, a convicted felon and snitch, to testify that Gauger had also confessed to him. The true killers later admitted to the murders and were convicted. Gauger received a gubernatorial pardon based on actual innocence in

2002, six years after his conviction had been reversed on other grounds. *Id.* at 9; Northwestern Center on Wrongful Convictions Website, *Gary Gauger*, *available at* http://www.law.northwestern.edu/wrongfulconvictions/exonerations/ilGaugerSummary.html; *see also* C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1 (2003) (describing the case of Earl Bramblett, who was sentenced to death and executed, based in part on testimony by a snitch who later recanted); GRAND JURY REPORT, *supra*, at 37 (referring to a survey showing that snitches were used in approximately one-third of an extensive sample of cases in which defendants were sentenced to death).

In these cases involving thin evidence, "[the] very lack of evidence tends to make it much more difficult to evaluate the veracity of the would-be cooperator." Cohen, *supra*, at 822. Corroboration becomes even more difficult when an informant's testimony includes few details about the alleged crime, but instead only vague statements – such as "the defendant told me he pulled the trigger" – that are "easy to make but extremely difficult . . . to disprove." THE MORIN COMMISSION, *supra*, *Recommendations*, No. 41, ¶ 2, at 13. Again, this case offers an illustration: the snitch testified simply "that the Hicks robbery 'went sour' and that Ventris shot Hicks before robbing him of money, keys, and a vehicle." Petr. Br. 3.

Even when a snitch provides more details regarding the crime, that may be no indication of veracity. Snitches have a variety of ways to "obtain the necessary information about another prisoner's

pending charges in order to convincingly fabricate a confession." Christopher Sherrin, *Jailhouse Informants, Part I: Problems With Their Use*, 40 CRIM. L.Q. 106, 113 (1998). Snitches can gather the information necessary to fabricate a false confession "from law enforcement officials, the media, [or even from] the defendant himself," even when he has denied, rather than confessed to, a crime.[5] *Id.* at 113-14 (citing GRAND JURY REPORT, *supra*, at 27-31); Yaroshefsky, *supra*, at 959-61 (describing how prosecutors have sometimes communicated key information to witnesses during proffer sessions). And snitches have especially good access to such information in high-profile cases, which receive greater media coverage. Also, when – as in this case – the State puts an informant in the defendant's cell, prosecutors are particularly likely to have provided the snitches with at least some of the very information they need to create untruthful testimony.

The danger posed by unreliable snitch testimony is not minimized by limiting its use to impeachment purposes. In cases involving thin evidence and no eyewitness testimony, the possibility that a defendant will testify is – the State's suggestion in its opening brief notwithstanding – neither "remote [nor] highly speculative." Petr. Br. 25. To the contrary, in

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[5] Some defense counsel even refuse to leave case materials with clients who are being held pending trial because of the possibility that a snitch will rely on such materials to conjure up a false confession, despite the added difficulties that this decision poses to preparing for trial. *See* Sherrin, *supra*, at 119-20.

cases such as this one, in which two individuals have flatly inconsistent stories, as a realistic matter the defendant is often forced to testify, and his credibility is central to the case. Thus, the cases in which prosecutors are most likely to use snitch testimony may be the very cases in which defendants are most likely to want to take the stand and thus to be either impeached or deterred from testifying by untruthful informant testimony.

2. The particular problems that snitches present are compounded by the already serious challenges to ensuring reliability of cooperating witnesses in general. Because of the paucity of details that typically accompany snitch testimony, "the prosecutor is forced to rely to a greater extent on his 'gut reaction' than on tangible evidence." Cohen, *supra*, at 822. Yet in judging the reliability of any informant, prosecutors' assessments will be "no doubt coloured by their genuine views on [the defendant's] guilt; as a result, evidence which undermine[s] the informants [will be] more easily discarded and largely inconsequential evidence [will] be[come] confirmatory." THE MORIN COMMISSION, *supra*, *Executive Summary*, at 10. Similarly, a prosecutor's ability to judge the credibility of testimony is compromised if the prosecutor becomes invested in a particular informant, particularly if the consequence of coming to doubt his veracity in a current case would call into question the validity of prior convictions that depended on the snitch's testimony. This phenomenon, "known by prosecutors as 'falling in love with your rat,'" diminishes a prosecutor's necessary level of skepticism. Yaroshefsky, *supra*, at 944.

Consequently, prosecutors can develop a form of "tunnel vision" and thus too readily regard snitch testimony as credible. *See* THE MORIN COMMISSION, *Executive Summary*, *supra*, at 11. The investigation in Canada of the wrongful conviction of Guy Paul Morin for murder provides a particularly striking example. After Morin was exonerated by DNA evidence, a commission formed to investigate the causes of his wrongful conviction identified unreliable snitches as a primary factor. *Id.* at 1-3, 14. But even after Morin had been exonerated, the lead prosecutor in the case continued to believe a snitch's testimony that Morin "concocted a false alibi," despite all evidence to the contrary. *Id.* at 11. This willful blindness is all the more likely in cases such as this one, involving a state-recruited snitch, because the prosecutor or his law-enforcement colleagues handpick an inmate to serve as an informant and therefore have a personal stake in continuing to believe in him. No prosecutor wants to acknowledge that he has been duped by a rogue snitch.

Even without such tunnel vision, "as a general rule, people are poor human lie detectors." Saul M. Kassin, *Human Judges of Truth, Deception, and Credibility: Confident but Erroneous*, 23 CARDOZO L. REV. 809, 809 (2002) (citing Bella M. Depaulo *et al.*, *The Accuracy-Confidence Correlation in the Detection of Deception*, 1 PERSONALITY & SOC. PSYCHOL. REV. 346 (1997)). And this "general rule" applies equally to trained professionals, who have proved to be only marginally better than the average person at judging truthfulness. *See id.* at 811 (untrained college students accurately judged truthfulness 52.8% of the time, compared with accuracy rates of 55.8% for

police detectives, 55.7% for CIA, FBI, and military polygraph examiners, and 56.7% for trial judges). Moreover, training in particular techniques intended to increase accuracy in judging truthfulness instead increases only false confidence in those judgments and not their accuracy. *Id.* at 813-14.

B. Defense Counsel Are Unable Effectively To Rebut Unreliable Informant Testimony.

Although defense counsel have strong incentives to challenge snitches' reliability, they are especially disadvantaged in combating unreliable snitch testimony. At trial, defense counsel often cannot adequately rebut snitch testimony. And prior to trial, defense counsel are largely powerless to stop a snitch from inventing a false confession. Even putting aside purely fabricated snitch stories, defense counsel can do little to combat the coercive atmosphere of prison, which may induce a defendant into making untrue but self-incriminating statements.

1. At trial, defense counsel face significant disadvantages in impeaching unreliable snitch testimony. "Due to the frequent movement of prisoners, the difficulties encountered in investigating" the circumstances surrounding "jail house confessions are severe and become nearly impossible with the passage of time." GRAND JURY REPORT, *supra*, at 44. Thus, much of a defense counsel's cross-examination must focus on the snitch's incentives to lie.

However, defense counsel frequently find it just as difficult to establish what benefits a snitch has received in exchange for testimony. GRAND JURY

REPORT, *supra*, at 39. This difficulty is particularly likely to arise when agreements between prosecutors and snitches have not been reduced to writing, but are only implicit or inchoate. *Id.* As a result of such tacit arrangements, "[t]he entire circumstances regarding benefits and the expectation of benefits, in many cases, are not adequately presented to the judge or jury for them to have the necessary factual basis to evaluate the testimony of the informant." *Id.* at 76.

For example, in one case, a snitch who testified that the defendant had confessed to him also "testified that he had asked for nothing and that the District Attorney would not even discuss favorable treatment with him." GRAND JURY REPORT, *supra*, at 76-77. However, "[w]ithin a day of this testimony," the snitch gave the prosecutor "a sample form for a letter he wished written to the Department of Corrections requesting an early release." *Id.* at 77. Precisely because the letter was ultimately sent only after the defendant was convicted, "[t]he jury was never apprised of this request"; instead, it "was advised that benefits are not awarded for testimony." *Id.*

Moreover, less formal benefits may be especially difficult to discover. Unlike dropped charges, defense counsel are unlikely to learn of benefits involving conditions of confinement such as preferential treatment or relaxation of jail rules. GRAND JURY REPORT, *supra*, at 12; *see also id.* at 12-15; *see supra* at 23. As a result, defense counsel will rarely be able to communicate to a jury the full scope of incentives granted to inmates who provide incriminating testimony.

This confluence of factors increases the "difficulty of the defen[s]e to disprove [a snitch's] claims to a confession" and makes the use of snitch testimony "a 'ready recipe for disaster.'" Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 762 (2002) (quoting THE MORIN COMMISSION, *supra*, *Executive Summary*, at 14). Such witnesses often have strong incentives to lie and all the means to do so, and yet in any given case, defense counsel may be unable to expose these sources of unreliability to the jury. As a result, at the very least, the snitch's testimony seriously compromises the credibility of the defendant's testimony, and therefore his case.

2. While defense counsel are hampered in their ability to rebut snitch testimony at trial, they can do even less to avoid the snitch-generated creation of confessions in the first instance. Any competent defense counsel will of course advise her client not to discuss his case outside the lawyer's presence with anyone, and certainly not with a stranger with whom he is sharing a jail cell. But regardless of his lawyer's advice, a defendant cannot avoid being placed in physical proximity to an informant who is willing simply to fabricate false testimony. "Some informants were so notorious that defendants, who would find themselves even momentarily in a holding cell with them, were reported to say 'Get me out of here, get me away from him,' knowing that even slight exposure would make the defendant vulnerable to a falsely claimed confession." THE MORIN COMMISSION, *supra*, at 567-68 (citing GRAND JURY REPORT, *supra*). Most snitches are not so notorious but they may be even more dangerous because a

defendant has no way to know that he should try to avoid them. And as discussed above, such snitches are perfectly capable of making up false confessions that are convincing to prosecutors and juries alike. *See supra* Part II.A.

Additionally, the ever-present danger of false snitch testimony materializing at the last moment impedes the truth-seeking function for an independent reason: it interferes with defense counsel's ability to prepare and present their strongest case. Because snitch testimony is so damaging and difficult to rebut, defense counsel may decide for strategic reasons not to have the defendant testify if a snitch materializes and is available for impeachment. Therefore, the possibility of snitch testimony may dissuade a defendant from taking the stand even when he otherwise might have done so. And defense counsel may learn of such a snitch only just before trial, as snitches often come forward only at the last second.

3. A defense counsel's advice to avoid discussing the charged offense could be rendered irrelevant for another reason that further undermines the reliability of any resulting statements. Petitioner recognizes the problems for reliability posed by coerced confessions, yet paradoxically argues that the risk of coercion is less in cases of snitch testimony than in cases of police testimony. Petr. Br. 32-35. But this argument actually turns the dynamic on its head.

First, the State ignores the inherently coercive atmosphere in prison. Experts recognize that "even when an informant accurately reports a confession by another inmate, that confession may be unreliable

because it was coerced or induced." Sherrin, *supra*, at 115. In fact, snitches, who are presumably in jail because they already have shown a disregard for the law, likely are more inclined to use illegal or coercive means to obtain a confession than police – who are more likely to follow the law because of their "increasing professionalism . . . and the possibility of internal discipline." U.S. Br. 10, 28.

Even absent direct intimidation, "some inmates . . . react to their vulnerability by volunteering false stories of past criminal behaviour to other inmates. They may feel that such fabrications are necessary in order to boost their standing within the prison community and reduce the threats to their personal safety." Sherrin, *supra*, at 116 (citing Elizabeth Ganong, *Involuntary Confessions and the Jailhouse Informant: An Examination of* Arizona v. Fulminante, 19 HASTINGS CONST. L.Q. 911, 928 (1992)). In *Arizona v. Fulminante*, for instance, this Court recognized that a defendant's jailhouse confession to a snitch had been coerced. 499 U.S. 279, 285-88 (1991). The Court held that even a promise by the snitch to protect the defendant could constitute coercion because "it was fear of physical violence, absent protection from his friend (and Government agent) [the snitch], which motivated [the defendant] to confess." *Id.* at 288.

III. At A Minimum, Informant Testimony Should Not Be Admitted Unless It Is Corroborated.

Given the inherent unreliability of snitch testimony, it should be inadmissible at trial when obtained in violation of the Sixth Amendment,

regardless whether the prosecution seeks to present the testimony as part of its case in chief or for impeachment purposes. At a minimum, however, snitch testimony should be admissible for impeachment purposes only if it satisfies a basic reliability requirement: corroboration. And such corroboration is not present in this case.

1. In other areas of the law, this Court has held that the Constitution requires exclusion of types of evidence that are especially prone to unreliability absent additional safeguards. Thus, for example, this Court has excluded identifications obtained under unduly suggestive circumstances unless the identifications "possess[] sufficient aspects of reliability." *Manson v. Brathwaite*, 432 U.S. 98, 106 (1977).

A study commissioned by the American Bar Association has proposed an analogous safeguard to ensure reliability in cases involving snitch testimony: Reasoning that "'[t]he most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him,'" it recommended that "[c]orroboration [] be required in jailhouse informant cases; no person should lose liberty or life based solely on the testimony of such a witness." AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 6 (2005) (quoting Judge Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1394 (1996)).

2. Such safeguards are available, as evidence from several other jurisdictions shows. For example, in the wake of a series of snitch-related scandals, the Los Angeles District Attorney's Office enacted a

policy that prohibited snitches from testifying "to a defendant's oral statement, admission or confession unless strong evidence exists which corroborates the [snitch's] truthfulness." STEVE COOLEY, LOS ANGELES COUNTY DISTRICT ATTORNEY'S OFFICE, LEGAL POLICIES MANUAL 187 (2005). District attorneys seeking to use a snitch must request written approval from a committee made up of the Office's senior leadership. *Id.* Texas also imposes corroboration requirements for police informants in some drug cases. *See* TEX. CODE CRIM. PROC. ANN. art. 38.141 (Vernon 2007).

Safeguards have also been imposed on the use of snitch testimony in Canada, where the Attorney General of Ontario permits prosecutors to use snitch testimony only "where this evidence is justified by a compelling public interest, founded on an objective assessment of reliability." CROWN POLICY MANUAL, IN-CUSTODY INFORMERS (Mar. 2005), *available at* http://www.attorneygeneral.jus.gov.on.ca/english/crim/cpm/2005/InCustodyInformers.pdf. In cases in which the use of snitch testimony is deemed necessary, the Attorney General's office "requires a rigorous, objective assessment of the informer's account of the accused person's alleged statement, the circumstances in which that account was provided to the authorities and the in-custody informer's general reliability." *Id.*

By contrast, Kansas provides none of these safeguards. In this case, for example, although law enforcement officials "recruited Doser to share a cell with Ventris and to 'keep [his] ear open and listen' for incriminating statements," Pet. App. 8a, the State failed to take any steps to ensure the reliability of

Doser's testimony by tape-recording conversations between the two cellmates or otherwise seeking to corroborate Doser's testimony.

3. The practicability of requiring corroboration, or other safeguards, for the admission of snitch testimony is also illustrated by a related development: the adoption of such measures in cases involving accomplice testimony. *Cf. Lee v. Illinois*, 476 U.S. 530, 546 (1986) (describing "the time-honored teaching that a co-defendant's confession inculpating the accused is inherently unreliable, and that convictions supported by such evidence violate the constitutional right of confrontation"). If anything, this development only strengthens the case for requiring such safeguards in snitch cases, since the problems with reliability here are even greater.

Sixteen states have statutes mandating corroboration for accomplice informants. Thirteen of those require corroboration for all accomplice testimony, regardless whether the informant was in custody.[6] California's law is illustrative: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with

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[6] ALASKA STAT. Ann. § 12.45.020 (West 2008); CAL. PENAL CODE § 1111 (West 2008); IDAHO CODE ANN. § 19-2117 (West 2008); IOWA CODE ANN. § 813.2 (West 2008); IOWA CT. RULES, R. 2.21(3); MINN. STAT. ANN. § 634.04 (West 2008); MONT. CODE ANN. § 46-16-213 (2007); NEV. REV. STAT. ANN. § 175.291 (West 2007); N.Y. CRIM. PROC. LAW § 60.22 (McKinney 2008); N.D. CENT. CODE § 29-21-14 (2007); OR. REV. STAT. ANN. § 136.440 (West 2008); S.D. CODIFIED LAWS ANN. § 23A-22-8 (2008); TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 2007).

the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." CAL. PENAL CODE § 1111 (West 2008). Three more states impose similar safeguards for accomplice testimony in felony cases. ALA. CODE § 12-21-222 (2008); ARK. CODE ANN. § 16-89-111(e) (West 2008); GA. CODE ANN. § 24-4-8 (West 2008) (corroboration also required when accomplice is sole witness in cases of treason or perjury). And Tennessee requires accomplice corroboration under common law. *See, e.g.*, *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001) ("[A] conviction may not be based solely upon the uncorroborated testimony of an accomplice.").

In addition to the states that require some form of corroboration for accomplice testimony, an even greater number of states also require "cautionary jury instruction[s]" in cases involving accomplice testimony. AMERICAN BAR ASSOCIATION, *supra*, at 6; *see also* Sara Darehshori et al., *Empire State Injustice: Based upon a Decade of New Information, a Preliminary Evaluation of How New York's Death Penalty System Fails to Meet Standards for Accuracy and Fairness*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 91 (2006).

This Court should not allow lower courts to admit unreliable jailhouse snitch testimony for impeachment purposes. But if the Court chooses to do so at all, it should at the very least require that these statements meet the same type of corroboration requirements that apply to confessions offered by accomplices that connect the defendant with the charged offense. Here, too, Kansas falls far short of the norm.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kansas should be affirmed.

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AMICUS CURIAE BRIEF

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STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ Of Certiorari To The Kansas Supreme Court

BRIEF OF AMICI CURIAE STATES OF NEW MEXICO, ALABAMA, ARIZONA, COLORADO, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, MARYLAND, MICHIGAN, MONTANA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA ON BEHALF OF PETITIONER

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QUESTION PRESENTED

Whether a criminal defendant's "voluntary statement obtained in the absence of a knowing and voluntary waiver of the [Sixth Amendment] right to counsel," *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), is admissible for impeachment purposes – a question the Court expressly left open in *Harvey*, and which has resulted in a deep and enduring split of authority in the Circuits and state courts of last resort?

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INTEREST OF THE AMICI CURIAE

The Amici Curiae States appear in support of Petitioner, the State of Kansas. Supr. Ct. Rule 37.1. The Amici have a significant interest in the question presented by Petitioner's brief on the merits, the answer to which has the potential to affect dramatically the conduct of criminal trials across the Nation. As demonstrated by the Petition for Writ of Certiorari, courts around the country have become hopelessly split on the question presented since this Court specifically reserved ruling on it in *Michigan v. Harvey*, 494 U.S. 344, 354 (1990).

SUMMARY OF THE ARGUMENT

When a criminal defendant takes the stand in his or her own defense, determining his or her credibility is usually the jury's single most important factfinding function. The Kansas Supreme Court majority's opinion severely handicaps the jury's ability to perform that function effectively. In holding that Respondent was wrongfully impeached by volunteered words from his own mouth, the majority effectively recognized a constitutional right to commit perjury in these circumstances. That result contravenes principles affirmed in *Nix v. Whiteside*, 475 U.S. 157, 173 (1986); *Harris v. New York*, 401 U.S. 222, 225 (1971); and *Walder v. United States*, 347 U.S. 62, 65 (1954), among other cases.

This Court has previously excluded a criminal defendant's statements for all purposes only when the statements at issue were compelled. In other situations, a witness's statements, however obtained, may be used for impeachment purposes. The different treatment of involuntary and voluntary statements is based on fundamental constitutional principles whose surpassing importance was not recognized in the majority's opinion. Those animating principles include the importance of the constitutional text, which specifically excludes compelled self-incrimination; obvious concerns about the quality of evidence obtained by compulsion; and the human and political rights transgressed when government officials compel a suspect to incriminate him- or herself. None of those principles is served by the *per se* rule adopted by the Kansas majority.

This Court's Sixth Amendment precedent requires a court to balance the twin goals of substantive justice and procedural fairness to determine what course of action promises the greatest benefit at the least cost. *Hudson v. Michigan,* 547 U.S. 586, 591 (2006). The Kansas Supreme Court failed to perform the required balancing. Had it done so, it would have recognized its *per se* rule of inadmissibility did little to promote procedural fairness, because the incentive for police officers or prison officials knowingly to violate the Sixth Amendment in hopes that the accused will take the stand and commit perjury on the precise subject of investigation is so small. In addition, there are legitimate and constitutional reasons

for officials to investigate a person facing pending charges. *Texas v. Cobb*, 532 U.S. 162, 171-72 (2001); *Massiah v. United States*, 377 U.S. 201, 207 (1964). Under the Kansas Supreme Court's *per se* rule, evidence gathered by such permissible means is not admissible even if it is unexpectedly made relevant by the defendant's perjurious testimony. But because the collection of such evidence is not wrongful, it is not in need of deterrence. The majority's blanket rule thus excludes properly-gathered evidence, which serves no constitutional or social purpose at all.

In addition, the Sixth Amendment has in recent years been a focus of this Court's sustained attention in several groundbreaking opinions, such as *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Those and many other cases have suggested new analytic approaches to the interpretation of the various clauses of the Sixth Amendment, including a renewed emphasis on the constitutional autonomy of the jury as a factfinding body. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004). The Kansas Supreme Court's majority opinion did not consider any developments in Sixth Amendment jurisprudence since 1990. Had it done so, it would have recognized that its approach, which reduces the jury's authority by severely limiting its ability to make the most important of all credibility determinations, is inconsistent with *Blakely* and related cases.

ARGUMENT

This case involves a private conversation between the Respondent and his cellmate. Because charges were pending against Respondent and the cellmate was cooperating with authorities, the prosecution conceded that Respondent's voluntary statements were inadmissible in its case in chief pursuant to the rule established by *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980). *See also Kuhlmann v. Wilson*, 477 U.S. 436, 459-60 (1986). The Kansas Supreme Court held, as a matter of federal constitutional law, that the statements also could not be used to impeach Respondent after he took the stand in his own defense and testified to a version of events dramatically different than that he had recounted to his cellmate. This Court should reverse the Kansas Supreme Court.

I. The Trial Court Properly Allowed Voluntary Statements to Be Used for Impeachment Purposes.

For at least half a century, this Court's jurisprudence has recognized a constitutionally-significant distinction between evidence admitted during the prosecution's case in chief and evidence admitted to rebut a defendant's testimony. In *Walder v. United States*, 347 U.S. 62 (1954), involving physical evidence seized in violation of the Fourth Amendment, Justice Frankfurter's opinion for the Court observed:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Id. at 65.

In *Harris v. New York*, 401 U.S. 222 (1971), this Court similarly held that a statement taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), was properly used to impeach a testifying defendant. 401 U.S. at 225 26. That ruling was reaffirmed in *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975).

Only in one specific situation has this Court held that an illegally-obtained statement cannot be introduced against a criminal defendant even for purposes of impeachment: when the statement in question is the defendant's compelled self-incrimination. *Mincey v. Arizona*, 437 U.S. 385, 398, 401 (1978); *New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979). The former case involved the hours-long interrogation of a hospitalized gunshot victim as he passed in and out of consciousness. 437 U.S. at 399-400. In the latter case, this Court declared it "crucial" and "central" to its decision that the defendant's statement had been compelled by a grant of immunity. 440 U.S. at 458-59.

The Kansas Supreme Court majority treated the Respondent's private conversation with his cellmate

as if it were a compelled statement. But *Mincey* and *Portash* are based on three important constitutional principles, none of which was considered in the majority opinion. First and most significantly, the total exclusion of compelled self-incrimination is required by the text of the Fifth Amendment. The same is not true of voluntary statements obtained in violation of *Miranda* or *Massiah*. This Court's recent Sixth Amendment jurisprudence has emphasized the importance of the ratified text. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 51 (2004); *Davis v. Washington*, 547 U.S. 813, 824 (2006). Rights explicitly guaranteed in the text of the Constitution and thus knowingly ratified by the people stand on a different footing from rights established by judicial exegesis after the passage of centuries. *See District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. 2783, 2788-2812, 2821, 171 L.Ed.2d 637 (2008), and *id.* at 2822-23, 2846-47 (Stevens, J., dissenting).

Second, disparate treatment is justified by obvious concerns about the quality of evidence obtained by compulsion. *See, e.g., Jackson v. Denno*, 378 U.S. 368, 386 (1964) (referring to "the probable unreliability of confessions that are obtained in a manner deemed coercive"); *Watts v. Indiana*, 338 U.S. 49, 59-60 (1949) (Jackson, J., concurring in part and dissenting in part) ("Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner. Such treatment not only breaks the will to conceal or lie, but may

even break the will to stand by the truth. Nor is it questioned that the same result can sometimes be achieved by threats, promises, or inducements, which torture the mind but put no scar on the body."). For that reason, the exclusion of statements obtained by compulsion will often – perhaps usually – *further* truth-seeking by eliminating distracting falsehood. The same generalization cannot be made with regard to the exclusion of statements volunteered during a private conversation.

Third, the distinction is based on deep-seated convictions regarding the relationship of the state to the individual. *Jackson*, 378 U.S. at 386. Freedom from official maltreatment is the only right guaranteed twice in the Bill of Rights, in both the Fifth and Eighth Amendments. The exclusion of compelled statements is an expression of "important human values" whose significance is at least as great outside the courtroom as within it. *Blackburn v. Alabama,* 361 U.S. 199, 206 (1960). The same cannot be said of the right at issue in this case. Indeed, the Kansas majority would have reached the opposite result if the cellmate had switched allegiance after rather than before the fateful conversation. Pet. App. 22a. In other words, nothing directly experienced by Respondent himself violated his Sixth Amendment right to counsel, but only a sequence of events that occurred out of his presence and without his knowledge. Indeed, the majority's summary of facts, Pet. App. 8a (informant was instructed to "'keep [his] ear open and listen' for incriminating statements"), show the

informant's instructions complied with the rule laid down in *Kuhlmann,* 477 U.S. at 459-60 ("the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks"). Apparently the informant crossed the line between merely listening and actively eliciting statements, prompting the prosecution's trial-court concession. Pet. App. 57a; Joint Appendix at 154. But the line between proper and improper use of informants in the prison setting is a thin one. *State v. Swinton*, 847 A.2d 921, 966 (Conn. 2004) ("there is no bright line test by which this determination is made"). A right so transitory and conditional is not a basic political or human right on the same level as the right to be free of official maltreatment.

None of these important reasons for treating voluntary and involuntary statements differently was considered by the Kansas Supreme Court majority. Far from considering the triad of important considerations undergirding the distinction drawn in *Mincey* and *Portash*, the majority did not even cite those cases. Only the dissent did so. Pet. App. 42a. Rather, the majority saw its task as choosing between "two analytical approaches", Pet. App. 19a, and concluded that one approach would discourage behavior of which it disapproved. Pet. App. 21a. That too-narrow focus was constitutional error.

II. Prohibiting the Use of Voluntary Statements for Impeachment Purposes Undervalues the "Truth-Seeking" Function of Trials.

Accurate credibility determination by the jury is not an evil in need of judicial remedy. Perjury, on the other hand, is. The Kansas Supreme Court's majority opinion failed to recognize the full implications of its categorical elevation of the goal of procedural fairness over the equally-important goal of substantive justice. A proper weighing would have revealed minimal if not wholly illusory benefits achieved at unjustifiably great cost.

A. This Kansas Supreme Court's Opinion Failed to Abide by This Court's Precedent Requiring a Court to Balance the Twin Goals of Substantive Justice and Procedural Fairness.

"A trial ideally is a search for the truth." *Portuondo v. Agard,* 529 U.S. 61, 77 (2000) (Ginsburg, J., dissenting). Self-evidently, the truth cannot be arrived at by concealing important pertinent information from the jury. On the contrary, this Court has recognized that "the need for information in the criminal context" is especially weighty. *Cheney v. United States District Court,* 542 U.S. 367, 384 (2004). The criminal justice system has a "'fundamental' and 'comprehensive' need for 'every man's evidence.'" *Id.* (quoting *United States v. Nixon,* 418 U.S. 683, 709-10 (1974)). The majority of the Kansas

Supreme Court failed to recognize the importance of the system's needs.

In *Banks v. Dretke,* 540 U.S. 668 (2004), this Court emphasized "the 'special role played by the American prosecutor in the search for truth in criminal trials.'" *Id.* at 696 (quoting *Stickler v. Greene,* 527 U.S. 263, 281 (1999)). That is a role embraced by most prosecutors as a matter of professional pride. But in the following passage the Kansas Supreme Court's majority denied that judges have a comparable duty to the truth:

> Although trial judges are called upon to determine the admissibility of evidence to effectuate the courts' truth-seeking function, there is nothing in our federal or state constitutions that requires us to make truth-seeking the overriding principle that trumps our constitutionally protected rights.

Pet. App. 20a.

That passage encapsulates the sporting theory of courtroom procedure, by which the judge's sole duty is to enforce the rules of the game without regard to truth and justice. Roscoe Pound, "The Causes of Public Dissatisfaction with the Administration of Justice," 40 AM. L. REV. 729, 738-39 (1906). But while procedural fairness is indeed an important goal of the American criminal justice system, it is not the sole goal. Substantive justice is also important. True justice cannot reliably be premised on anything but the jury's appreciation of the significant knowable

facts. Because substantive justice and procedural fairness are both goals of the justice system, this Court has repeatedly held that evidence should be suppressed only "'where its deterrence benefits outweigh its "substantial social costs."'" *Hudson v. Michigan,* 547 U.S. 586, 591 (2006) (quoting *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 364-65 (1998), which in turn quoted *United States v. Leon,* 468 U.S. 897, 907 (1984)).

The scale metaphor conveys that procedural fairness and substantive justice are both worthy goals. One is not categorically more important than the other. When they conflict, a comparison must be made of costs and benefits. The correct option is that which promises the greatest benefit at the least cost. *Id.*

Far from comparing potential benefits against certain costs, however, the Kansas Supreme Court's majority adopted an absolute ranking of priorities, holding that a non-textual constitutional prohibition on certain forms of factual investigation is always a higher priority than "truth-seeking" – the pursuit of substantive justice. Pet. App. 20a. That absolute ranking of priorities was contrary to the interpretation of the assistance of counsel clause adopted by this Court in *Nix v. Williams,* 467 U.S. 431, 446 (1984) ("Williams contends that because he did not waive his right to the assistance of counsel, the Court may not balance competing values in deciding whether the challenged evidence was properly admitted. . . . We disagree.").

In creating an absolute ranking of priorities, the majority informed the Respondent that he could provide a version of events under oath at retrial without risk that his jury would hear the much different version he told in private when his guard was down. That ruling effectively recognized a constitutional right to commit perjury in this uncommon but far from unique situation. In the past, this Court has not hesitated to use strong words to describe similar results. *Hass*, 420 U.S. at 723 ("inadmissibility would pervert the constitutional right into a right to falsify free from the embarrassment of impeachment evidence from the defendant's own mouth"); *Harris*, 401 U.S. at 225-26 ("The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."); *Walder*, 347 U.S. at 65 ("Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment."). The word used by this Court in the cited cases is equally applicable to the Kansas Supreme Court's majority opinion.

B. If a Proper Balancing of Interests Were Performed, It Would Reveal Marginal Benefits but Massive Losses.

"[T]he value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 547 U.S. at 596. The majority's opinion identifies the targeted incentive: "Allowing the admission of this testimony as rebuttal evidence would

invite the State to engage in clandestine behavior in gathering evidence in violation of our constitutional rights." Pet. App. 21a. The concern, then, is that the State will engage in clandestine evidence-gathering despite certain knowledge that evidence so gathered cannot be used in its case in chief, based on the hope that the defendant will choose to take the witness stand and commit perjury regarding the precise subject of the illegally-gathered evidence, making it usable on rebuttal.

That situation obviously does not arise frequently in Kansas – otherwise this case would not have raised an issue of first impression. *See* Pet. App. 57a-59a. Thus the court was concerned about the incentive officials have to clandestinely gather evidence in hopes that events beyond their control will follow one relatively uncommon course rather than any number of other, far more likely courses. But when there is "little to gain from taking any dubious 'shortcuts' to obtain the evidence", the exclusionary rule can have little deterrent effect. *Williams,* 467 U.S. at 446. *See also Hass*, 420 U.S. at 723 (genuinely abusive official misconduct can be recognized and dealt with on a case-by-case basis).

The Kansas Supreme Court's rule will achieve little real deterrent effect for another reason, too: the exclusionary rule cannot deter conduct that is not thwarted by its application. A rational prison official might have an incentive to obtain information from a represented prisoner for purposes wholly unrelated to the charges pending against him, such as the

investigation of prisoner misconduct. Although evidence gathered for such an unrelated purpose might occasionally become relevant to a defendant's credibility in a pending case, eliminating its incidental use as impeachment will obviously have no tendency to deter its collection for the other purpose, even if such deterrence were socially desirable. *Terry v. Ohio*, 392 U.S. 1, 14 (1968) (the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal").

Similarly, a rational police officer or prison official has a realistic incentive to gather evidence from a represented person awaiting trial when investigating a different crime. But, self-evidently, suppressing impeachment evidence in one prosecution will not deter investigations into other crimes, even if such deterrence were socially desirable. *See Massiah*, 377 U.S. at 207 (being accused of one crime provides no immunity from investigation for other crimes). *Accord Texas v. Cobb*, 532 U.S. 162, 171-72 (2001) ("the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses").

Finally, a rational police officer or prison official has an incentive to engage in the passive evidence-gathering permitted by *Kuhlmann*. 477 U.S. at 459-60. The majority's blanket rule thus excludes some

properly-gathered evidence, which serves no constitutional or social purpose at all.

In short, the benefits of the majority's *per se* rule are small and perhaps entirely illusory. Balanced against them are costs both mundane and grand. At the mundane level, the Kansas majority's *per se* rule would inevitably produce disputes about the "real" purpose of any collateral police investigation or prison intelligence-gathering, imposing administrative costs on the courts to decipher the "real" motive and increasing the likelihood of inconsistent and hence unpredictable results. Such unpredictability could only vitiate any hypothetical deterrent effect.

Moreover, taking "a grander view of our process," *United States v. Goodlow*, 597 F.2d 159, 163 (9th Cir. 1979) (Kennedy, J., for the court), nothing less than justice itself is imperiled by the judicial countenancing of perjury. *Nix v. Whiteside*, 475 U.S. 157, 174 (1986) ("No system of justice worthy of the name can tolerate" a lawyer's passive acceptance of a client's perjury); *United States v. Mandujano*, 425 U.S. 564, 576 (1976) (plurality) ("Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings."). *See also Mathews v. United States*, 485 U.S. 58, 71 (1988) (White, J., dissenting) (describing "the scourge of an effective criminal justice system: perjury"). That is why "[i]t is well established that a criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 265 (1998). The

majority opinion of the Kansas Supreme Court adds an asterisk to that categorical statement.

In short, while the majority's opinion makes procedural fairness a higher priority than substantive justice, its opinion does little to ensure fairness, at least as anyone outside the criminal justice system would define that term. But it does much to prevent justice, and much to erode the confidence of ordinary citizens in their judicial system.

III. The Kansas Supreme Court's Majority Opinion Improperly Ignored this Court's Recent Sixth Amendment Jurisprudence.

In the 18½ years since the Court expressly left open the issue presented by this case, *Michigan v. Harvey*, 494 U.S. 344, 354 (1990), this Court has cited the Sixth Amendment in no fewer than 174 decisions, according to a Westlaw search. Some of those decisions have revolutionized our understanding of the Sixth Amendment, as for example *Crawford v. Washington*, 541 U.S. 36 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). While those particular decisions and many of the others examined parts of the Sixth Amendment other than the assistance of counsel clause, it is not self-evident why different analytic approaches would be appropriately applied to the various clauses of a single-sentence Amendment.

The Kansas Supreme Court majority did not consider any of the paradigm-shifting developments

in Sixth Amendment interpretation since *Harvey* was decided in 1990. One major theme to emerge from this Court's recent Sixth Amendment caselaw is the political significance of the jury's traditional autonomy. That recent emphasis is a corrective to the single most striking long-term trend in constitutional criminal procedure: the systematic diminution of the jury's autonomy, a process that has proceeded apace since *Sparf v. United States,* 156 U.S. 51 (1895). Judge Jack Weinstein is only one of several recent observers to suggest the pendulum is beginning to swing back from its apogee. *United States v. Polizzi,* 549 F.Supp.2d 308, 421-22 (E.D. N.Y. 2008) (citing *Crawford* for the proposition that "Justice Gray dissenting in *Sparf* seems to have hit both the modern and ancient marks exactly.").

Recent caselaw has recognized that the jury is an aspect of the Framers' political plan for divided government. *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("the right of jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."). In concrete terms, jury service is practical democracy, a way for ordinary citizens to participate in the functioning of their government. *Powers v. Ohio,* 499 U.S. 400, 406-07 (1991). *Accord Miller-El v. Dretke,* 545 U.S. 231, 272-73 (2005) (Breyer, J., concurring); John Paul Stevens, "Foreword, Symposium: The Jury at a Crossroad: The American Experience," 78 CHI.-KENT L. REV. 907, 907 (2003). The Kansas Supreme Court's majority opinion diminishes "the democratic element

of the law." *Powers*, 499 U.S. at 407. Allowing a defendant to testify under oath without fear of self-contradiction by his own prior volunteered remarks deprives the jury of information essential to the effective performance of its core credibility-determining function.

The interpretative approaches developed in this Court's recent decisions concerning other clauses of the Sixth Amendment should apply equally to the assistance of counsel clause. When so applied they reveal that the Kansas Supreme Court's majority opinion is far outside the mainstream currents of contemporary Sixth Amendment jurisprudence.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Kansas Supreme Court.

Respectfully submitted,

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PETITION FOR RE-HEARING

(EB)

(15)

Supreme Court, U.S.
FILED
MAY 20 2009
OFFICE OF THE CLERK

No. 07-1356

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS

Petitioner,

V.

DONNIE RAY VENTRIS

Respondent.

On Writ of Certiorari to the Supreme Court

of the State of Kansas

RESPONDENT'S PETITION FOR REHEARING

COMES NOW, Donnie Ray Ventris respondent pro se and respectfully petitioning this Honorable Court for a rehearing of it's decision rendered on 29 April 2009 reversing the Kansas Supreme Court in Kansas vs Ventris, 556 U.S. _____ (2009).

Respondent asserts that the decision in general is within the province of this Court, the remand for rehearing included in the decision is not as State statutory and procedural time limits have expired and as such the respondent should not be subjected to the charges again.

FURTHER Respondent believes the Court allowed the State to use foul tactics of disinformation to influence the Court in making it's decision causing it to overlook the obvious illegal tactics

of the prosecution.IN SUPPORT the following is offered.

1) On 1 February 2008 the Supreme Court of the State of Kansas overturned the Respondent's conviction for Aggravated Robbery and Aggravated Burglary in Montgomery County Kansas Case No. 04 CR 241.

2) Respondent gave Notice to the State of Kansas that I would not relinquish my rights to a speedy trial on 11 March 2008.

3) The Decision of the Kansas Supreme Court became final on 1 May 2008 by State law.

4) The State of Kansas did not,as a result of the Kansas Supreme Court's decision.

   A) Refile charges and ask for a continuance until petition for certiorari could be heard.

   B) Petition the Court for a stay of it's decision until petition for certiorari could be heard.

   By this failure the State surrendered any further jurisdiction in this matter on 1 May 2008;pursuant to Kan.Stat.Ann. § 22-3402.

5) Kansas case precedent has disallowed filing for Petition for Certiorari in and of itself to toll the time restraints in filing and/or refiling actions. 28 U.S.C. §2244 (d)(1)(A) and 28 U.S.C. §2244 (d)(2).

6) As to the decision itself,respondent asserts that the Court allowed the fact that I was initially charged with murder in this case to unduly influence it;Respondent was found **Not Guilty** in District Court by a jury therefore is innocent of the offense but this Court in it's decision noted that either the respondent

or the State's witness murdered the victim.This is evidently a finding of fact not in the record and should not have been considered in the decision.

7) Although the State did not use the jailhouse snitch in it's "official"(sic)case in main,it is clearly evident through the endorsement of him as a witness that the tactical decision had been made before hand to use him as a witness.As such the State did defacto use the snitch in it's case in chief even if procedurally they did not use him in it dejure.The State's readily admitted violation of respondent's constitutional rights is thinly argued as correct due to the argument of use only for impeachment purposes other than as a main support of it's case in chief.

8) Respondent acknowledges that this Court has the jurisdiction to decide questions of constitutional violations and to make said decisions binding as precedent in the future,but believes because of State statutes that this decision should have no effect on me in the instant matter.

WHEREFORE Respondent prays this Honorable Court grant my petition for rehearing with said hearing taking into consideration the issues raised above.

Respectfully Submitted;

Donnie Ventris

Donnie Ray Ventris pro se

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CERTIFICATE OF SERVICE

I, Donnie R. Ventris due hereby state under oath that I served a true and correct copy of the foregoing motion for rehearing upon the Kansas Attorney General Steve Six by depositing said motion in the United States mail postage pre-paid addressed to Steve Six, Kansas Attorney General, 120 S.W. 10th Avenue,2nd Floor, Topeka, Kansas 66612 and another copy of said motion to Matthew Edge, Kansas Appellate Defender in the same manner addressed 700 Jackson, Suite 900, Topeka,Kansas 66603 on this the 19 day of May 2009.

Donnie Ventris
Donnie Ray Ventris

I state under oath that the motion was deposited in the United States mail box available to inmates on the 19 day of May 2009.

Donnie Ventris
Donnie Ray Ventris affiant

STATE OF KANSAS)
)ss:
COUNTY OF NORTON)

SUBSCRIBED AND SWORN TO before me by the affiant on this the 19 day of May 2009.

Notary public

LORI VAN EATON
Notary Public - State of Kansas
My Appt Expires 11-09-2011

MAY 20
2009

REPLY BRIEF

No. 07-1356

IN THE

Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

DONNIE RAY VENTRIS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Kansas

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ARGUMENT

I. THE FUNDAMENTAL PURPOSE OF THE SIXTH AMENDMENT RIGHT TO COUNSEL IS TO ENSURE A FAIR TRIAL THROUGH AN ADVERSARY PROCESS, WHICH OCCURRED IN THIS CASE.

A. Both parties and all amicus curiae in this case agree that the fundamental purpose of the Sixth Amendment right of a defendant "to have the Assistance of Counsel for his defence," U.S. CONST. amend. VI, is to ensure a fair trial through an adversary process. "[T]he core purpose of the [Sixth Amendment] counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Cronic*, 466 U.S. 648, 654 (1984). Respondent received precisely such assistance and a fair trial.

First, counsel fully assisted Respondent in his defense in the adversary trial setting. Doser's testimony was offered only after Respondent testified that he did not shoot the murder victim. Joint Appendix ("J.A.") at 142–143. Respondent's counsel confronted and fully cross-examined Doser, exploring whether law enforcement officials, other inmates, or anyone else told Doser anything about Respondent's alleged crimes before Doser and Respondent were placed together, what instructions law enforcement agents gave to Doser, and whether Doser received any benefit in exchange for his assistance to law enforcement. *Id.* at 151–155.

Second, the trial judge, as is commonly done, gave the jury a cautionary instruction, directing them that "[y]ou should consider with caution the testimony of an informant who, in exchange for benefits from the State, acts as an agent for the State in obtaining evidence against a defendant, if that testimony is not supported by other evidence." J.A. at 30.

Finally, the ultimate proof that Respondent received a fair trial is in the result: the jury acquitted Respondent of the murder charge, the most serious charge to which Doser's testimony was relevant. By any objective measure, Respondent received a fair trial on the murder charge with "the Assistance of Counsel for his defence."

B.1. Respondent and his amicus seek a rule of total exclusion that would skew rather than promote fair trials. Only by ignoring (1) the fundamental goal of seeking the truth in criminal trials and (2) the risk of perjury by criminal defendants, can Respondent and his amicus argue for such a rule. The Court, in contrast, repeatedly has emphasized "the enormous social cost of excluding truth in the search for truth in the administration of justice," *Nix v. Williams*, 467 U.S. 431, 445 (1984), and that a "criminal defendant's right to testify does not include the right to commit perjury." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

The Court has applied a rule of total exclusion when constitutional text, in particular the Fifth Amendment prohibition against self-incrimination, compels such a result. *See, e.g., New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979). As a general

matter, however, in determining the scope of the exclusionary rule—irrespective of whether the case involves a Fourth Amendment, *Miranda*, or Sixth Amendment violation—the Court has engaged in a balancing analysis, weighing the costs of exclusion against its benefits. Furthermore, the Court consistently has concluded that such an analysis requires the exclusion of unlawfully obtained evidence from the government's case in chief, but not for impeachment purposes when a defendant testifies inconsistently with prior statements or other evidence.

Nothing in the Sixth Amendment or any other constitutional provision defines what it means "to have the assistance of counsel." The Court has held that, "once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990). But the Court also has held that the right to counsel does not include a right to assistance in presenting perjured testimony, *Nix v. Whiteside*, 475 U.S. 157, 174–75 (1986), and that statements elicited in violation of the rule of *Michigan v. Jackson*, 475 U.S. 625 (1986), nonetheless may be used for impeachment if the defendant testifies inconsistently with his prior statements. *Harvey*, 494 U.S. at 351–52.

2. Importantly, unlike the Fifth Amendment prohibition against self-incrimination, nothing in the Sixth Amendment suggests that complete exclusion

of a defendant's voluntary statements made outside the presence of counsel is either necessary or proper to ensure a fair trial. To the contrary, in previous Sixth Amendment right to counsel cases, as well as in Fourth Amendment and *Miranda* cases, the Court *always* has engaged in a cost-benefit balancing analysis to determine the scope of the exclusionary rule. Apart from the extremely narrow set of cases involving compulsion or involuntary statements, the Court has *never* adopted a rule of total exclusion. Instead, the Court consistently has permitted the use of relevant, probative evidence to impeach a defendant who testifies in conflict with his own prior statements or other evidence against him.

The balancing analysis is by now familiar and well-established. The Court balances the benefits of exclusion (deterring future police misconduct) against the costs (*e.g.*, countenancing perjury, keeping the truth from the jury, setting the guilty free) to determine whether the exclusionary rule should apply and, if so, to what extent.

For Sixth Amendment purposes, the application of the cost-benefit balancing analysis is water already under the bridge, with the Court having engaged in precisely such an analysis in both *Michigan v. Harvey* and *Nix v. Williams*. *See* 494 U.S. at 350–53; 467 U.S. at 442–48. Further, in those cases the Court rejected a remedy of total exclusion, explaining that such a draconian rule "would do nothing whatever to promote the integrity of the trial process, but would inflict a wholly unacceptable burden on the

administration of criminal justice." *Nix v. Williams*, 467 U.S. at 447.

In *Harvey*, the Court held that statements elicited in violation of the *Jackson* rule remain admissible for impeachment, even though the situation in *Harvey* presents far more potential for police misconduct than in the *Massiah v. United States*, 377 U.S. 201 (1964) context. In the *Jackson/Harvey* situation, the police directly initiate contact with the defendant and actively seek a waiver of the defendant's right to counsel. In that setting, there is at least the potential for police coercion or intimidation. That is not the case when an informant elicits statements from a defendant, as Respondent acknowledges when he argues that defendants "may be fooled" by informants into saying they committed a crime. Resp. Br. at 15. Respondent's invitation to adopt a rule of total exclusion here and jettison the cost-benefit balancing analysis is not justified by either constitutional text or precedent.

C. Finally, contrary to Respondent's suggestion, there are not significant reasons to distinguish *Massiah* violations from Fourth Amendment, *Miranda*, and *Jackson* violations. In all of the latter situations, the Court has applied the balancing analysis and held that improperly obtained evidence can be used for impeachment purposes if and when a defendant testifies inconsistently with his prior statements or other evidence against him.

Evidence obtained from Fourth Amendment, *Miranda*, and *Jackson* violations "functionally t[ies] counsel's hands before the parties even walk through

the courtroom doors," Resp. Br. at 18, just as much as a *Massiah* violation. Indeed, the similarities between the former violations, on the one hand, and a *Massiah* violation, on the other, are far greater than their differences. All of these violations involve the government obtaining evidence unlawfully. All of the evidence obtained through such violations can aid the government in obtaining a conviction. And all such evidence can make it more difficult for defense counsel to achieve a not guilty verdict or a lesser sentence.

Any differences between these violations are far less than Respondent claims. Certainly, *Miranda* and *Jackson* were decided with future trials in mind, and not for the purpose of protecting independent, exogenous constitutional interests such as the privacy rights that the Fourth Amendment protects. And, like the Fourth Amendment but unlike the Fifth Amendment, the Sixth Amendment's text does not dictate exclusion as a remedy for violations.

The Court's numerous cases permitting the use for impeachment purposes of evidence obtained in violation of *Miranda* and *Jackson*, as well as the Court's prior application of the balancing analysis in Sixth Amendment cases such as *Michigan v. Harvey* and *Nix v. Williams*, strongly supports Kansas in this case. The Court here should hold once again that "the interests safeguarded by the exclusionary rule . . . [are] outweighed by the need to prevent perjury and to assure the integrity of the trial process." *Stone v. Powell*, 428 U.S. 465, 488 (1976).

II. THE COSTS OF EXCLUDING, FOR ALL PURPOSES, RELEVANT AND PROBATIVE VOLUNTARY STATEMENTS UNLAWFULLY OBTAINED FAR OUTWEIGH ANY MARGINAL BENEFIT IN DETERRING GOVERNMENT MISCONDUCT.

A. Significant Incentives Already Exist For Police And Prosecutors To Follow The Law.

Respondent and its amicus appear to endorse the propositions that no prosecutor is to be trusted and that all police seek to violate constitutional standards whenever doing so might result in obtaining evidence that may be useful in some way at some time. *See, e.g.*, Resp. Br. at 16; NACDL Amicus Br. at 20. The truth, however, is much more complicated than that, and there already exist several significant deterrents to police and prosecutorial misconduct.

1. First, as the Court has said in other contexts, such as describing the anticipated behavior of the States and state judges, there is a presumption that the States and their officials will act in good faith to follow and uphold the Constitution. *See, e.g., Alden v. Maine*, 527 U.S. 706, 755 (1999) ("We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that" federal standards will be followed); *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976) ("we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States"). The Court has never

assumed, nor should it, that state prosecutors systematically and intentionally violate, or encourage police to violate, a defendant's constitutional rights.

Rather, the Court long has assumed that prosecutors follow the Constitution and the rules of professional ethics, and that ethical standards and professional discipline in particular will act as a significant deterrent to prosecutorial misconduct. *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 427, 429 (1976). Similarly, the Court recently recognized that police professional standards and discipline create important incentives for police to follow the law, much more so than when the Court first adopted the exclusionary rule decades ago. Combined with much stronger professional training and supervision than once may have been the case, police professional norms and discipline provide significant protection against police misconduct. *See Hudson v. Michigan*, 547 U.S. 586, 598-99 (2006). Indeed, there is no evidence in this case of either prosecutorial or police bad faith or improper motives. Here, at worst, the informant failed to follow his instructions carefully.

2. As explained previously, there are strong incentives to follow the law in this context. Kansas Br. at 25. Because placing an informant in a cell to act as a "listening post" does not violate the Sixth Amendment right to counsel *at all*, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986), any statements obtained from a defendant in that scenario will be admissible for *all* purposes. Having a defendant's inculpatory statements available for use in the government's case in chief is far more helpful than (1) purposefully

violating the *Massiah* rule (2) in the hope of obtaining something that might be useful (3) if and only if the defendant both (a) actually testifies at trial and (b) does so inconsistently with statements previously made to an informant.

3. There may be disagreement among the parties and amici in this case regarding the availability of a suit under 42 U.S.C. § 1983 for a *Massiah* violation. In its opening brief, Kansas asserted that Section 1983 might be invoked against police officers involved in a *Massiah* violation, as well as against a municipality if police or prosecutors were acting pursuant to an "official policy or custom" in committing *Massiah* violations. *See* Kansas Br. at 25–28.

Respondent and the United States appear to take the position that the Sixth Amendment is not violated until any statements obtained from the defendant in violation of *Massiah* actually *are introduced at trial.* U.S. Amicus Br. at 28 n.7; Resp. Br. at 21. That position suggests that police alone could never violate the Sixth Amendment right to counsel, though they might participate in such a violation.

It is unnecessary to decide the question of precisely when a Sixth Amendment violation occurs in order to resolve this case. If the violation is complete at the time police use an informant to deliberately elicit incriminating statements from a defendant, then the deterrence logic that justifies limiting the exclusionary rule to the government's case in chief with respect to Fourth Amendment and

Miranda violations is directly applicable here, because Section 1983 liability will be a deterrent to police misconduct. If, on the other hand, the violation is not complete until the elicited statements are introduced at trial, then the logic that supported limiting the exclusionary rule in *Michigan v. Harvey* is directly applicable. Either way, there is no justification in the Constitution or the Court's cases for treating a *Massiah* violation like the narrow and unique category of compelled or involuntary statements.

In any event, even if Section 1983 will not support a claim against police here, many other important deterrents indisputably exist, making a rule of total exclusion unnecessary as a deterrent measure. Such deterrents include the prohibition on using the defendant's statements in the government's case in chief, the existence of professional ethics rules and the prospect of professional discipline, and the threat of municipal liability even if prosecutorial misconduct is protected by absolute immunity (municipalities have no immunity in Section 1983 cases). Importantly, police and prosecutors have a strong incentive to follow the rule of *Kuhlmann* when utilizing informants because adherence to the law will permit the government to use a defendant's voluntary statements for all purposes, including in its case in chief, not just as impeachment.

B. Total Exclusion Of Informant Testimony Would Prevent The Jury From Hearing Often Relevant, Probative, And Reliable Evidence While Permitting Criminal Defendants To Commit Perjury.

Respondent's amicus, and to a great extent Respondent himself, suggest in essence that informants are inherently unreliable and that their uncorroborated testimony should be *per se* inadmissible, or else subject to special evidentiary and procedural rules. Such claims are radical, running contrary to two centuries of American (and even longer British) reliance upon cross-examination in an adversary process before a jury to determine the credibility of testimonial evidence in pursuit of the truth in criminal cases. *See, e.g.*, 5 J. Wigmore, *Evidence* § 1367 p.32 (J. Chadbourn rev. 1974) (cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth").

Not surprisingly, the Constitution provides no basis for such special rules, and the Court long ago rejected any such proposition. Indeed, Sixth Amendment right to counsel cases such as *Massiah* and *Kuhlmann* stand in direct contradiction of the argument. In none of those cases did the Court even suggest, much less hold, that informant testimony is inherently unreliable. To the contrary, the Court long has recognized that such evidence is admissible, subject to the normal rules of evidence, cross-examination, and trial procedure.

In fact, informant testimony regarding voluntary statements a defendant has made to a person the

defendant believed (erroneously) to be a friend, ally, or confidante, may be extremely reliable. Furthermore, informants often have no prior knowledge of the crimes with which a defendant is charged, or the circumstances of those crimes, prior to talking with the defendant, making it impossible for them to fabricate the substance of a defendant's statements to match non-existent prior knowledge of the crime and its circumstances. In this case, Doser testified, on cross-examination, that the police did not tell him that Respondent was charged with murder, nor had he heard such information from other inmates, from visitors, or from any other source prior to his conversations with Respondent. J.A. at 151–152.

Further, there are reasons to think that statements made to informants may be even *more* reliable than statements elicited by direct police interrogation, where the possibility of coercion or intimidation may exist. Nonetheless, in *Michigan v. Harvey*, the Court held that statements obtained directly by the police in violation of the *Jackson* rule remain admissible for impeachment purposes. The logic and circumstances of *Harvey* effectively foreclose any argument for a different exclusionary rule for a *Massiah* violation, where there is not even a possibility of official coercion or intimidation because the defendant believes he is speaking to a friend or ally, and no threats of any kind have been or will be made.

Jailhouse informants themselves have incentives not to be aggressive or too active in questioning

cellmates. Jails can be dangerous places, and being discovered as a government informant could have significant, negative consequences, a fact of which Doser was well aware in this case. *See* J.A. at 155 ("I didn't want to push for any information. I didn't want to subject myself to being injured.") Thus, informants, too, have significant incentives to follow *Kuhlmann* rather than violate *Massiah*.

To the extent Respondent and his amicus argue that informants are inherently unreliable, they actually bolster the Court's longstanding concern about perjury by criminal defendants. By necessity, jailhouse informants themselves are criminal defendants. If such informants are inherently unreliable, logic suggests that criminal defendants as a group may be inherently unreliable. Certainly, it is not lost on juries (nor has it ever been lost on the Court) that criminal defendants may have incentives to be less than forthcoming or candid when they testify in their own defense. That is a basis for the Court's repeated warnings about condoning or encouraging perjury, and a fundamental reason for jury trials—to permit a cross-section of citizens to evaluate the credibility of *all* witnesses, including criminal defendants.

Moreover, it is common for trial judges to instruct the jury, as the trial judge did in this case, to evaluate an informant's testimony with caution, particularly when the informant has received a benefit from the government in exchange for testifying. There is no constitutional basis for

imposing additional restrictions or more severe and unique limitations on informant testimony.

III. THE ALTERNATIVE PROPOSALS THAT RESPONDENT AND HIS AMICUS OFFER ARE FUNDAMENTALLY FLAWED.

As an alternative to a rule of total exclusion, Respondent proposes that statements obtained in violation of the *Massiah* rule be admissible only "when necessary to prevent intentional false testimony." Resp. Br. at 26. His amicus offers a different alternative, namely that such a statement be admissible "only if it satisfies a basic reliability requirement: corroboration." NACDL Amicus Br. at 26. These "alternative" proposals are fundamentally flawed, run contrary to two centuries of American jurisprudence and, if adopted, would prove to be a "cure" with far worse consequences for the criminal justice system than any current perceived problems with informant testimony.

Respondent's alternative proposal effectively acknowledges that perjury by criminal defendants is a serious concern, and that impeachment of at least some criminal defendants who testify is critical to protecting the integrity of the criminal justice system. But even cursory consideration of the proposed alternative demonstrates that the only workable and constitutionally justified approach is to permit impeachment whenever a defendant testifies and the informant's testimony will contradict the defendant, just as the Court has held repeatedly in the Fourth Amendment, *Miranda*, and *Jackson* cases.

Fundamentally, the alternative proposals invite this Court to create special, unique rules on the basis of policy judgments, not constitutional requirements. There are two centuries of American jurisprudence in place to deal with informant testimony, as demonstrated by this case. Here, Respondent's counsel had information regarding any benefits Doser received from the government for his testimony, was able to cross-examine Doser aggressively on a variety of topics, and the trial judge gave the jury a cautionary instruction regarding informant testimony. These rules and measures protected Respondent's rights in this case, just as they long have been deemed adequate to protect criminal defendants' rights in general. Indeed, such measures proved quite effective here. Given the opportunity to assess Doser, the jury apparently did not believe him, at least not beyond a reasonable doubt, because it acquitted Respondent of murder, the primary charge Doser's testimony addressed.

Further, there is no constitutional "corroboration" requirement applicable to criminal defendants' testimony, though Respondent and his amicus must acknowledge that, by definition, informants placed in cells with defendants generally are themselves criminal defendants. Surely Respondent and his amicus are not intending to suggest that all criminal defendants are inherently unreliable and untrustworthy. If that is their suggestion, then any rule applied to informants logically should be extended also to criminal defendants generally. Because the right of a defendant to testify does not

include the right to commit perjury, the logic of the amicus alternative proposal is that the courts should require "corroboration" before a criminal defendant is permitted to testify.

Respondent and his amicus are inviting this Court to create unique new rules for informant testimony without any basis in constitutional text, history, or precedent. Equally important, it is not at all obvious that the alternatives are workable or would improve rather than undermine the criminal justice system. For example, under Respondent's proposal, would a trial court have to hold a mini-trial—putting the main trial on hold—to hear evidence to determine whether the defendant committed perjury during his trial testimony (in order to decide, under Respondent's alternative, whether the prosecution could then use the testimony of an informant to contradict the defendant's "perjury")? Would such a proceeding itself have to be conducted with a jury which, after all, is charged with determining the credibility of witnesses in our constitutional system? Moreover, by what standard of proof would the trial court have to determine that a defendant's testimony was perjurious? And would a finding that perjury had been committed be given collateral estoppel effect in a subsequent criminal prosecution for perjury? These questions are merely illustrative, and hardly exhaustive, of the many problems and complexities that Respondent's alternative proposal would create.

Similarly, adopting a "corroboration" alternative also would create complex and difficult questions.

Respondent's amicus necessarily cannot really answer questions such as what would constitute sufficient "corroboration" to justify the admission of informant testimony, or when and how a trial court would determine whether such corroboration existed. Indeed, Respondent's amicus acknowledges that existing corroboration policies have been created by state legislatures and prosecutor offices as a matter of policy, not by courts as a matter of constitutional law. *See* NACDL Amicus Br. at 26–27 (citing Texas law and Los Angeles District Attorney policy).

In recent years, particularly in the *Apprendi v. New Jersey*, 530 U.S. 466 (2000), line of cases, the Court has emphasized the primary and fundamental role that juries play in determining the critical facts in criminal cases. Respondent and his amicus seek to create rules of law that limit the jury's ability both to hear witnesses and to evaluate fully the credibility of those witnesses. Furthermore, there is no suggestion in this case that the jury was somehow fooled or duped by the prosecution; indeed, it appears that the jury was skeptical of Doser's testimony because it in fact acquitted Respondent of the murder charge, the focus of Doser's testimony.

Ultimately, there is no reason to think that the traditional safeguards—among them disclosure of any benefits an informant receives from the government, an opportunity by defendant's counsel for vigorous cross-examination of an informant, cautionary jury instructions by the trial judge, and faith in a jury's ability to judge credibility—are insufficient to protect against untruthful informant

testimony. The Court need not and should not accept the invitation of Respondent and his amicus to substitute unproven policy judgments for settled jurisprudence.

IV. THIS CASE AND THE ISSUE PRESENTED ARE PROPERLY BEFORE THE COURT.

A. Respondent, as he did in his Opposition to the Petition for a Writ of Certiorari, at 9–12, raises the state law question whether he can be retried in the Kansas courts in the event this Court were to affirm the Kansas Supreme Court decision. Resp. Br. at 4, n.1. That question already has been answered in the State's favor by the state trial court, *see* Reply to Opposition to Petition for a Writ of Certiorari ("Reply to Opp."), at 1a–3a, presents only issues of Kansas law, and has no effect on the Court's jurisdiction to decide the Sixth Amendment issue.

The Court had before it the relevant information and authority regarding jurisdiction when the Court decided to grant Kansas's petition for a writ of certiorari, *see* Reply to Opp. 4–6, and the Court's grant, at a minimum, implicitly rejected Respondent's suggestion that his state law claim is relevant to the Court's jurisdiction. Kansas filed its timely petition for a writ of certiorari on April 28, 2008, well before the Kansas Speedy Trial Act clock would have run even under Respondent's erroneous view of Kansas law. The Court has jurisdiction.

Nor is there any question of mootness here. A decision in favor of Kansas will reinstate Respondent's convictions or, at a minimum, require further proceedings in the state courts to determine if

other grounds exist to preclude reinstatement. A decision in favor of Respondent will simply return the case to the trial court where Respondent can litigate the state law speedy trial act claim that he asserts precludes another trial (a claim which the trial court already has rejected). Either way, this Court's decision on the Sixth Amendment issue will matter.

B. Respondent also erroneously suggests that "Petitioner and its amici" are challenging Kansas' concession in the lower courts that a violation of Respondent's Sixth Amendment right to counsel occurred. Resp. Br. at 17, n.2. Kansas has not challenged the concession made in the state courts or the merits of the rule of *Massiah v. United States*, 377 U.S. 201 (1964). *See* Kansas Br. 18–19, n.* ("the prosecutors throughout the state courts assumed there was a violation, and Kansas does not challenge that assumption here"), 34 ("Kansas is not challenging [the *Massiah*] rule").

That said, a party's concessions do not make binding constitutional precedent. "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (internal citations omitted); *see also Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478–79 (2006) (same). Kansas and the United States have simply pointed out that the State's concession below may have been ill-advised (relying as the prosecutors

apparently did upon Kansas precedent no longer valid in light of the Court's decision in *Kuhlmann*), a point also made by the Chief Justice of Kansas in her dissenting opinion below. *See* Pet. App. 35a–37a. It is neither necessary nor appropriate for the Court to revisit the State's concession now, and Kansas does not ask the Court to do so.

The facts of this case may well demonstrate the vagaries of, and difficulties in applying, the constitutional lines that the Court has drawn in *Massiah* and *Kuhlmann*, as well as the tension that may exist between cases such as *Kuhlmann* and *United States v. Henry*, 447 U.S. 264 (1980). Ultimately, however, it is unnecessary to consider whether the facts below establish a Sixth Amendment violation. Because Kansas has conceded the question, both in the state courts and in this Court, the sole "issue here is remedy." *Hudson v. Michigan*, 547 U.S. 586, 590 (2006).

* * * * *

At bottom, this case distills to one essential question: for exclusionary rule purposes, is there justification in constitutional text or the Court's cases for treating a *Massiah* violation differently than Fourth Amendment, *Miranda*, and *Jackson* violations? For the reasons set forth above and in Kansas's opening brief, the answer is "No."

Instead, this case should be resolved by applying the well-settled, cost-benefit balancing analysis that the Court consistently has relied upon in all exclusionary rule cases other than the narrow,

unique set involving compelled or involuntary statements. Here, the balance strongly favors limiting the scope of the exclusionary rule for *Massiah* violations to the government's case in chief. Precluding impeachment use of such evidence imposes too great a cost on the integrity of the judicial system by condoning perjury, a cost far in excess of any resulting marginal deterrent effect on official misconduct. For exclusionary rule purposes, a *Massiah* violation is in the same category as Fourth Amendment, *Miranda*, and *Jackson* violations.

CONCLUSION

The decision of the Kansas Supreme Court should be reversed.

Respectfully submitted,

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